Supreme Court of the United States

OCTOBER TERM, 1945

No. 696

THE UNITED STATES, PETITIONER

vs.

JOSEPH A. HOLPUCH COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 43809

JOSEPH A. HOLPUCH COMPANY, A CORPORATION

vs.

UNITED STATES OF AMERICA.

Petition—Filed January 12, 1938

To the Honorable the Judges of the United States Court of Claims:

The petition of Joseph A. Holpuch Company, a corporation, respectfully shows:

I

That petitioner is a corporation organized and existing under the laws of the State of Illinois; that it has at all times borne true faith and allegiance to the Government of the United States of America, and has in no way aided, abetted, or given encouragement to rebellion against said Government.

2 II

Under date of June 15, 1933, the War Department, Office of the Quartermaster General, Construction Division, issued specifications for the construction of 16 Two-story Company Officers' Quarters at Fort Sam Houston, Texas, to which specifications were added Addenda No. 1 on October 2, 1933; Addendum No. 2 on October 6, 1933; Addenda No. 3 on October 9, 1933; Addendum No. 4 on October 10, 1933; Addendum No. 5 on October 11, 1933; Addenda No. 6 on October 14, 1933; Addendum No. 7 on October 19, 1933; Addendum No. 8 on October 21, 1933; Addendum No. 9 on November 9, 1933; and Addendum No. 10 on November 13, 1933; all of which became a part of said specifications, said specifications being described and identified as No. QM-8; that an invitation for bids for the doing of said work was

issued on November 5, 1933, and that said bids were opened on November 20, 1933; that petitioner having submitted the lowest satisfactory bid for the work contemplated by said specifications, a formal contract, upon U. S. Government Standard Form No. P. W. A. 51 and identified as Contract #W 6278 QM 115, was entered into between petitioner and the United States of America (hereinafter for brevity sometimes referred to as "the Government") on November 29, 1933. A copy of said contract is attached hereto, marked, Petitioner's Exhibit "A" and is prayed to be taken and read as a part hereof.

That the contract, specifications, plans and drawings governing the work were prepared and drawn by the defendant.

3 III

Under date of November 30, 1933, petitioner was given orders by the Government to proceed with the work specified in the contract not later than December 18, 1933, and it did thereupon begin the work and carried on same promptly and efficiently, except when it was interrupted in so doing by acts and omissions on the part of the Government, as hereinafter set forth; that the contract provided that petitioner furnish all labor and materials and perform the work required by said contract for the sum of One Hundred Seventy-eight Thousand, One Hundred Twenty Dollars ($178,120), in accordance with the plans and specifications.

That the specifications provided that the work be under the control of the Constructing Quartermaster and that Captain A. F. Dershimer was designated as such Constructing Quartermaster in charge of the work specified in said contract, and that said Captain A. F. Dershimer acted as such Constructing Quartermaster and representative of the Government during the entire construction period.

Petitioner proceeded with the work and construction progressed normally except at such times as petitioner was interrupted, hindered, delayed and prevented from so doing by changes in plans, drawings and specifications and because the Government would not allow petitioner to proceed with excavation of piers, as hereinafter set forth.

IV

Part of the work required by the contract consisted of installing spiral spacers of reinforcing steel in all
4 piers. Paragraph 24, page 11, of the specifications is as follows:

> 24. *Placing.*—Metal reinforcement shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suitable clips at intersections, and shall be supported by concrete or metal chairs or spacers, or metal hangers.

In the doing of the work petitioner prepared to tie and secure said spiral reinforcing steel to vertical steel by using annealed steel wire of not less than No. 18 gauge, and made all arrangements for doing so in accordance with the plans and specifications.

The Constructing Quartermaster refused to allow petitioner to tie and secure said reinforcing steel spirals to vertical steel by using annealed steel wire, but required and insisted that petitioner furnish and install a special patented metal spacer or clip. Petitioner protested to doing so and advised the Constructing Quartermaster that, in order to substitute metal spacers in lieu of annealed steel wire of not less than No. 18 gauge to tie and secure said spirals to vertical steel, it would require extra compensation and a change order. The Constructing Quartermaster refused to issue such change order and refused to allow petitioner to proceed with the work unless petitioner furnished and installed said metal spacers to tie and secure reinforced steel spirals to vertical steel. That the cost to petitioner for installing said metal clamps or clips, over and above the cost of tying and securing spiral reinforcing steel to vertical steel with annealed steel wire of not less than No. 18 gauge, was One Hundred Eighty-four Dollars and Eighty Cents ($184.80), which is a reasonable and fair charge.

5 Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who

declined said claim. That payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of One Hundred Eighty-four Dollars and Eighty Cents ($184.80), for which petitioner asks judgment.

V

At the time the contract was entered into, the rate and scale of wages for skilled mechanics had been established at Fort Sam Houston, being the zone and area where this work was to be performed. Said scale and rate supplied to petitioner and so established at that time provided for a minimum rate of wage to be paid to bricklayers of $1.00 per hour.

Section (e), Article 18 of the specifications, provides as follows:

> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

After the work was in progress, and on or about July 16th, the Government notified petitioner that there had been a ruling made by the Board of Labor Review fixing and establishing the minimum rate of wage for bricklayers in the area and zone where the work was
6 to be done at $1.25 per hour, and required petitioner to pay said rate of $1.25 per hour in the future and from the date of said ruling, to all laborers employed as bricklayers on said project. That the difference between the minimum rate of $1.25 per hour as fixed by the ruling of the Board of Labor Review and $1.00 per hour, which was the minimum rate of wage given to petitioner and established for the zone and area in which the work was being

done, was One Thousand, Thirty-six Dollars and Sixty-one Cents ($1,036.61), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who declined said claim. That payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of One Thousand, Thirty-six Dollars and Sixty-one Cents ($1,036.61), for which petitioner asks judgment.

VI

The contract between petitioner and the defendant contained the following provisions:

> ART. 7. (c) *NRA materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.
>
> ART. 18. *Wages.*—(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

The Contracting Officer did not certify that compliance with the National Industrial Recovery Act in reference to the purchase of lumber for this project was not in the public interest or that the consequent cost would be unreasonable.

By the terms of the contract petitioner was required to comply with the terms of the National Industrial Recovery Act, which was in force at the time said contract was entered into and during the time that the work provided for

in the contract was in progress. Petitioner was also required to observe all codes of fair competition and executive orders and rules in force at the time said contract was entered into and that might subsequently, from time to time, be enacted or issued.

At the time petitioner estimated the cost of doing the work provided for in the contract and submitted its bid, petitioner secured a proposal from Edward Hines Lumber Company, a reliable and responsible dealer in lumber, to furnish all lumber required to do said work provided for in the contract at the then prevailing prices. No code of fair competition had been established or published for the lumber or timber industries at the time said proposal was secured and when said contract between petitioner and the defendant was entered into. After said contract was entered into, a code known as "Code of Fair Competition" was established and published and provided that all
8 dealers in lumber observe and comply with same; that by said code and under the rulings of the Lumber Code Authority, minimum prices were established for lumber, which prices were higher than those contained in the proposal that petitioner had secured from said Edward Hines Lumber Company and upon which it based its estimate and bid; the increase in price applied to all dealers in lumber who complied with the National Industrial Recovery Act and was uniform; that said code became effective November 9, 1933.

In order to comply with the terms of its contract and observe the provisions of the National Industrial Recovery Act, petitioner was compelled to pay the increased price of lumber for all lumber required in the completion of the work provided for in the contract, and the amount petitioner was compelled to pay for lumber to complete said contract, over and above the amount it could and would have secured said lumber for, except for the increased price established and fixed by the Code of Fair Competition applicable to the lumber and timber industries and the rulings of the Lumber Code Authority, was Two Thousand, Seven

Hundred Four Dollars and Twenty Cents ($2,704.20), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General who declined said claim. That payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of Two Thousand, Seven Hundred Four Dollars and Twenty Cents ($2,704.20), for which petitioner asks judgment.

9 VII

Under the heading of "Excavating, Filling, Grading," etc. of the specifications, appearing on pages 8 and 9 of said specifications, the manner of doing excavating work necessary in connection with the work to be done under said contract, was defined. Under "Excavation," said specifications provided as follows:

> Excavations for footings shall be carried down to the depths and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings; they shall be carried to such levels as may be necessary and approved by C. Q. M.
>
> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the United States as per amount mentioned for excavating under "Unit Prices" of bid.

The unit price for pier excavation and bell foundations in the bid was $60.00 per cubic yard. The unit price for concrete, Type B, in piers and bell was $11.00 per cubic yard. The price for reinforcing steel in said bid was $60.00 per ton.

Plan No. 31-1-A, covering this work, provides and shows that piers are to be 33 feet to finished floor, said depth to reach to the bottom of the foundation bell.

In doing the excavating work the depths required on certain piers were less than 33 feet and, as to the balance, the depths required were in excess of 33 feet. Petitioner sub-

mitted its statement for said excavation when same was completed for approval, giving credit to the Government, as provided for by the specifications and according to the bid price, where piers were less than 33 feet in depth,
10 and claiming compensation for such piers where the depths required were in excess of 33 feet. That the additional amount to which petitioner is entitled for excavating, placing of reinforced steel and filling same with tremie concrete, over and above the amount allowed for piers at a depth of 33 feet and after giving to the United States credit on those piers where the depths were less than 33 feet, is Five Thousand, Seven Hundred Ninety-three Dollars and Nineteen Cents ($5,793.19), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who declined said claim. That payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of Five Thousand, Seven Hundred Ninety-three Dollars and Nineteen Cents ($5,793.19), for which petitioner asks judgment.

VIII

That the contract between petitioner and the defendant imposed upon the defendant an obligation that it would not hinder or delay petitioner in the doing of the work contemplated by the contract so that petitioner could proceed with its work in an orderly, unobstructed, usual, customary and economical manner and in sequence. Petitioner was unable to proceed and complete its work due to the failure of the defendant to observe and carry out this obligation and was continuously hindered and delayed by the defendant in the doing of said work, as hereinafter set forth.

The excavation for piers required in connection
11 with this work, in view of the nature of the work, terra, subsoil and general conditions, was required by the contract to be done in a particular manner and with

machinery and equipment specially designed and made for that type of work.

The amount of such equipment in the United States was very limited and it would have required a long period of time to manufacture and produce such equipment. When the contract was entered into, petitioner entered into a sub contract with the Excavation and Foundation Company of St. Louis, Missouri, who also had a contract for excavation with the S. & W. Construction Company of Memphis, Tennessee, who were engaged in the doing of similar work, under separate contract, at Fort Sam Houston, Texas, which said contract was being worked simultaneously with the contract of petitioner.

It was contemplated that excavation on all projects be done at approximately the same time, with the equipment which the Excavation and Foundation Company of St. Louis owned and had available. It had been arranged that certain excavations for piers be made on all buildings. When said Excavation and Foundation Company endeavored to excavate for piers under petitioner's contract, however, the Constructing Quartermaster refused to allow petitioner's subcontractor to do so and refused to allow it to move its equipment from the project under contract with the S. & W. Construction Company, notwithstanding that at times much of the equipment on the site of the project under contract with the S. & W. Construction Company was idle and could well have been used and employed in excavating work under petitioner's contract.

12 Petitioner and its subcontractor, Excavation and Foundation Company, repeatedly requested to be allowed to excavate for piers and move the equipment accordingly, but the Constructing Quartermaster persisted in his refusal and insisted that petitioner employ another excavating contractor, who was the only person, party or corporation who had any equipment suitable for this work other than the Excavation and Foundation Company. The work was of such a nature that no progress whatever could be made until the piers and foundations were excavated and poured, and the work under the contract was at a standstill

during all the time that the Constructing Quartermaster refused to allow said excavation to be done by the Excavation and Foundation Company. After a delay far in excess of the time for which liquidated damages have been charged herein, petitioner, in order to allow the work to progress, employed the subcontractor submitted by the Constructing Quartermaster but sustained a severe loss during said suspension and delay of the work.

Petitioner therefore submits that, the delay having been caused by the Government, through its representative, no liquidated damages should have been charged and that petitioner should be paid the sum of One Thousand, Seven Hundred Seventy-six Dollars ($1,776.00), withheld for liquidated damages.

That petitioner applied to the War Department for remission of the charge so wrongfully made as liquidated damages, which in turn submitted said claim to the Comptroller General; that the Comptroller General declined said claim; that payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of
13 One Thousand, Seven Hundred Seventy-six Dollars ($1,776.00), for which petitioner asks judgment.

IX

Petitioner avers that there is due it from the Government under said contract, the following amounts above enumerated:

Additional expense to petitioner for labor and material in being required to furnish and install spiral spacers in piers, not required by contract, as shown in Paragraph IV of this Petition	$ 184.80
Additional cost to petitioner for wages required to be paid to bricklayers in accordance with ruling of the Board of Labor Review as shown in Paragraph V of this Petition	1,036.61
Additional cost to petitioner in being required to pay increased price for lumber because of Code of Fair Competition under the National Industrial Recovery Act, as shown in Paragraph VI of this Petition	2,704.20
Balance due petitioner for excavation, as shown in Paragraph VII of this Petition	5,793.19
Balance due petitioner for amount illegally withheld as liquidated damages, as shown in Paragraph VIII of this Petition	1,776.00
Total	$11,494.80

Wherefore your petitioner claims that there is now justly due to it the sum of Eleven Thousand, Four Hundred Ninety-four Dollars and Eighty Cents ($11,494.80), exclusive of all set-offs and just grounds of defense, which amount it is justly entitled to recover from the United States of America.

14 X

Your petitioner says that no assignment or transfer of its claim, or any part thereof, or any interest therein, has ever been made by it or on its behalf to anyone and that it is entitled to recover from the United States of America the full amount of its claim as above set forth.

Wherefore, your petitioner prays judgment against the defendant, United States of America, for the sum of Eleven Thousand, Four Hundred Ninety-four Dollars and Eighty Cents ($11,494.80), together with interest and it costs herein expended.

JOSEPH A. HOLPUCH COMPANY,
By JOSEPH A. HOLPUCH,
President.

GEORGE M. WEICHELT,
1111 The Rookery, Chicago, Illinois,

NORMAN B. FROST,
FRANK H. MYERS,
FREDERIC N. TOWERS,
723 15th Street N.W., Washington, D. C.,
Attorneys for Petitioner.

15 [*Duly sworn to by Joseph A. Holpuch; jurat omitted in printing*]

17 *Exhibit "A" to Petition*

U. S. Government Form No. P.W.A. 51

Contract #6278 QM 115

Approved by the Federal Emergency Administrator of Public Works, September 7, 1933. Contractor's Number. Entered.

UNITED STATES GOVERNMENT FORM OF CONTRACT

(Federal Emergency Administration of Public Works Project)

War Department
Quartermaster Corps—Construction Service
(Department)

Joseph A. Holpuch Company
(Contractor)

Contract for The Construction of 46 Two-Story Company Officers' Quarters.

Amount, $178,120.00.

Site of the work: Fort Sam Houston, Texas.

The services and supplies to be obtained from this instrument are authorized by, are for the purpose set forth in and are chargeable to Procurement Authority QM 7315 P1-3211 A640-35 N. I. R. War Q. M. C. 1933-35, the available balance of which is sufficient to cover cost of same.

To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, Texas.

This Contract, entered into this 29th day of November, 1933, by THE UNITED STATES OF AMERICA, hereinafter called the Government, represented by the contracting officer executing this contract, and Joseph A. Holpuch Company, a corporation, organized and existing under the laws of the State of Illinois, of the city of Chicago, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

18 ARTICLE 1. *Statement of work.*—The contractor shall furnish all labor and materials, and perform all work required for The Construction of Twenty-Two (22) Two-Story Company Officers' Quarters at Fort Sam Houston, Texas $244,750.00

Omit six buildings @ $11,225.00—deduct $67,350.00

Install linoleum floor covering in kitchen, pantry and kitchen store rooms—16 bldgs. @ $45.00 each—add 720.00

Total deduction 66,630.00

for the consideration of One Hundred Seventy-Eight Thousand One Hundred Twenty and no/100 Dollars—($178,120.00) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows:

Specifications No. Q.M.-8.
Addenda Nos. 1 to 10 inclusive.
Drawings Nos. 31-1-A; 31-1-B; 31-1-C; 31-1-D; 31-1-F.
Sheet #2 (a) Unit Prices.

The work shall be commenced December 8, 1933 and shall be completed September 24, 1934. The contractor shall pay to the Government as fixed, agreed and liquidated damages, the amount of Two Dollars ($2.00) per house for each calendar day of delay in the completion of the work herein, beyond the time stated herein for completion, not excusable pursuant to Article 9 hereof.

19 UNIT PRICES

The following unit prices shall be used as a basis for making deductions from or additions to the contract provided any deviations from the drawings and specifications, decreases or increases the amount of work indicated or required herein. These prices shall include the furnishing of

all labor and material complete in place unless otherwise noted.

(1) Excavation, Gravel or Clay	$ .75	per cu. yd.
(2) Excavation, in piers and bell foundations	60.00	per cu. yd.
(3) Concrete, Type B, in forms	10.00	per cu. yd.
(4) Concrete, Type B, in piers and bell	11.00	per cu. yd.
(5) Reinforcing Steel	60.00	per ton
(6) Brick in Walls	30.00	per M
(7) Load Bearing Tile in Walls	.31	per sq. ft.
(8) Plastering	.60	per sq. yd.
(9) Stucco	.75	per sq. yd.

ART. 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ART. 3. *Changes.*—The contracting officer may at any time, by written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative.

Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he
21 finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from changes shall be adjusted as provided in article 3 of this contract.

ART. 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ART. 6. *Inspection.*—(*a*) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor

shall promptly segregate and remove the same from the premises.

(*b*) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work.

Special, full size, and performance tests shall be as
22 described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(*c*) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(*d*) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the re-

quirements contained in the preceding sentence, the
23 inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

ART. 7. (*a*) *Materials and workmanship.*—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment, which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

(*b*) *Domestic materials.*—In the performance of this work the contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the
United States, and only such manufactured articles,
24 materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except as provided in the specifications.

(*c*) *NRA materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

(*d*) *Local preference.*—So far as practicable, and subject to the provisions of sections (*b*) and (*c*) of this article, preference shall also be given to the use of locally produced materials if such use does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the contracting officer.

ART. 8. *Superintendence by contractor.*—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

ART. 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned by the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine, and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and

liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an
26 extension and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ART. 10. *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

ART. 11. (*a*) *Convict labor.*—No convict labor shall be employed on the project and no materials manufactured or produced by convict labor shall be used on the project.

(*b*) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and

feasible in the judgment of the contracting officer, no individual directly employed on the project shall be permitted to work more than 30 hours in any 1 week; *Provided*, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days. This provision shall supersede the terms of any code adopted under title I of the National Industrial Recovery Act.

(c) *Eight-hour law.*—No laborer or mechanic doing any part of the work contemplated by this contract, in
27 the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than 8 hours in any 1 calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of $5 shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than 8 hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137), relating to hours of labor.

ART. 12. *Covenant against contingent fees.*—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

ART. 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor

shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act
28 which will interfere with the performance of work by any other contractor.

ART. 14. *Officials not to benefit.*—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

ART. 16. *Payments to contractors.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(*b*) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the
29 contract: *Provided, however,* That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial pay-

ments in full: *And provided, further,* That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(*c*) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsiblity for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(*d*) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

(*e*) The contracting officer may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed by the contractor or any subcontractor on the work, the difference between the rate of wages required by this contract to be paid laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

ART. 17. *Additional security.*—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials

in the prosecution of the work contemplated by the contract.

ART. 18. *Wages.*—(*a*) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows.

Skilled labor	$1.00
Unskilled labor	.70

(*b*) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

31

(*c*) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

(*d*) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers."

(*e*) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(*f*) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of
32 the Board of Labor Review shall be binding upon all parties.

ART. 19. (*a*) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivisions and/or county in which the work is to be performed and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided,* That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

(*b*) *Employment service.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however,* That organized labor, skilled and unskilled, shall not be required to register at such local employment agencies but shall be secured in the customary ways through recognized union locals. In the event, however, that qualified workers are not furnished by the union locals within 48 hours (Sundays and holidays

excluded) after request is filed by the employer, such labor may be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and local unions,
33 the labor preferences provided in section (*a*) of this article shall be observed.

(*c*) *Compliance with title I, N.I.R.A.*—The contractor agrees to comply with the conditions prescribed in sections 7(a)(1) and 7(a)(2) of title I of the National Industrial Recovery Act, and to cause all subcontractors to comply therewith.

ART. 20. *Human labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shll be employed.

ART. 21. *Compensation insurance.*—The contractor will furnish compensation insurance for employees on this work and comply with the workmen's compensation laws of the State, Territory, or district in which the work is to be performed and will give proof of such adequate insurance satisfactory to the contracting officer.

ART. 22. *Persons entitled to benefits of labor provisions.*—The contractor will extend to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the contractor and such laborer or mechanic, or between any subcontractor and such laborer or mechanic.

ART. 23. *Inspection of records.*—The Federal Emergency Administrator of Public Works and the contracting officer, through their respective authorized agents, shall have access to all pay rolls, records of personnel,
34 invoices of materials, and any and all other data relevant to the performance of this contract.

ART. 24. *Reports.*—The contractor will make report in triplicate monthly through the contracting officer, and cause all subcontractors to report in like manner, within 5 days after the close of each calendar month on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. He shall also furnish to the contracting officer the names and addresses of all subcontractors on the work at the earliest date practicable.

ART. 25. *Termination for breach.*—In the event any of the provisions of articles 7 (*b*), (*c*), and (*d*), 11, 18-24, 26, of this contract are violated by the contractor or any subcontractor on the work, the contracting officer may terminate the contract by written notice to the contractor. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby; and the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

ART. 26. *Subcontractors.*—(*a*) The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such subcontractors, particularly articles 7 (*b*), (*c*) and (*d*), 11, 18-24.

35 (*b*) All bids submitted by subcontractors should state the minimum wage rates established in article 18 hereof.

(*c*) No subcontract shall be let to any subcontractor who has not signed and complied with the applicable code or codes of fair competition approved under title I of the National Industrial Recovery Act for the trade or industry or subdivision thereof to which his work relates, or, if there be no approved code of fair competition for such trade or

industry or subdivision, who has not signed and complied with the President's Reemployment Agreement.

ART. 27. *Accident prevention.*—The contractor shall at all times exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, State, and municipal safety laws and building and construction codes. All machinery and equipment and other physical hazards shall be guarded in accordance with safety codes approved by the American Standards Association, unless such codes are incompatible with Federal, State, or municipal laws or regulations. Nothing in this article shall be construed to permit the enforcement of any laws, codes, or regulations herein specified by any except the contracting officer.

ART. 28. *Definitions.*—(*a*) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved and "his representative" means any person authorized to act for him.

(*b*) The term "contracting officer" as used herein shall mean the officer who signs the contract on behalf of the Government, and shall include his duly appointed successor or his duly authorized representative.

36 ART. 29. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto:

ART. 30. *Patents.*—The Contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specifications, the use of which the contractor does not control.

In witness whereof the parties hereto have executed this contract as of the day and year first-above written.

THE UNITED STATES OF AMERICA,
By P. W. GUINEY,
Brig. General, QMC., Chief, Construction Division.
(Official title)

or his duly authorized representative.

JOSEPH A. HOLPUCH COMPANY,
Contractor.
By JOSEPH A. HOLPUCH, *Pres.*
4010 W. Madison St., Chicago, Ill.

Two witnesses:
ROSE LEBRECHT,
MARY STEKLAC.

I, Joseph H. Holpuch, certify that I am the secretary of the corporation named as contractor herein; that Joseph A. Holpuch, who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

37

[CORPORATE SEAL] JOSEPH H. HOLPUCH.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, ... who signed this contract for the ..... had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

.....
Contracting Officer.

This contract is authorized by the National Industrial Recovery Act, title II (Public, No. 67), approved June 16, 1933.

39 *General Traverse—Filed February 21, 1938*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained: and asks judgment that the petition be dismissed.

SAM E. WHITAKER,
Assistant Attorney General.

P.M.C.

Argument and submission of case

On January 9, 1945, the case was argued and submitted on merits by Mr. Norman B. Frost for plaintiff, and by Mr. W. A. Stern II for defendant.

41 *Special findings of fact, conclusion of law and opinion of the court by Whaley, Ch. J. — Filed May 7, 1945*

Mr. Norman B. Frost for the plaintiff. *Mr. George M. Weichelt* was on the brief.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special Findings of Fact

1. Joseph A. Holpuch Company, plaintiff herein, is a corporation of the State of Illinois, chartered to engage in the general building construction.

2. On November 29, 1933, the plaintiff entered into a contract with the defendant, represented by P. W. Guiney, Brig. General, Q. M. C., Chief, Construction Division, as contracting officer, whereby, for a consideration of $178,120, the plaintiff as contractor agreed to furnish all labor and materials, and perform all work required for the construction of 16 company officers' quarters (two-story type), Fort Sam Houston, Texas, in accordance with specifications, schedules and drawings made a part of the contract. The

contract was numbered W 6278 q m 115, and was on Government form P. W. A. 51 as a Federal Emergency Administration of Public Works project.

42 By the contract the work was to be commenced December 18, 1933, and be completed September 24, 1934, a period of 280 calendar days.

The contract, specifications, schedules and drawings are in evidence and made part hereof by reference.

Article 15 of the contract provided:

> *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Article G. C. 10 of the specifications provided:

> *Interpretation of contract.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. [meaning the defendant's constructing quartermaster] shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

Article 5 of the contract provided:

> *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article G. C. 27 of the specifications provided:

> *Extras.*—No charge for any extra work or material will be allowed unless the same has been ordered in writing by the C. Q. M., and the price stated in such order.

3. *Spiral spacers*, $184.80.

Reinforcing steel in concrete foundation piers was specified by the contract. It consisted of a circle of six
43 parallel vertical rods, their surfaces deformed for binding effect, and a spiral encircling them, to which the rods were attached at regular intervals. With regard to this reinforcement Article 24 of the specifications provided:

> *Placing.*—Metal reinforcements shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suitable clips at intersections, and shall be supported by concrete or metal chairs or spacers, or metal hangers.

Article 36 thereof provided with respect to pouring of the concrete, that before pouring reinforcement should be thoroughly secured in position and approved by the constructing quartermaster.

Article 38 provided:

> *Compacting.*—Concrete during and immediately after depositing, shall be thoroughly compacted by means of suitable tools. The concrete shall be thoroughly worked around the reinforcement and around embedded fixtures and into the corner of the forms.

The reinforcement required by the specifications was designed to constitute a structure within itself, of such rigidity as to withstand the displacing action of the pouring and puddling of concrete. This structure was fabricated in twenty-foot sections, before being lowered into the form for the pier. This form was a steel casing of the proper diameter and so equipped that it could be pulled after the concrete was poured. A tremie was used in the pouring. The

reinforcing structure was "supported by concrete or metal chairs or spacers, or metal hangers," to keep it the proper distance from the surface of the concrete, in this case about two inches. There is no controversy over the requirement or fulfillment of this specification, immediately quoted above.

The provision that "metal reinforcement shall be accurately positioned and secured against displacement by using annealed wire of not less than No. 18 gauge, or suitable clips at intersections," had reference to the tying of spiral and vertical rods together at their intersections.

It was possible to secure rods and spiral at their intersections firmly, with No. 18 annealed wire.

The parties' officers at the site were disagreed as to the interpretation of Article 24 of the specifications,
44 plaintiff taking the position that the spiral might be held at its intersections with the vertical rods by annealed wire, defendant taking the position that so-called "spiral spacers," having the sole function of maintaining regularity in the spiral turns, were required. The plaintiff ultimately furnished and used in the reinforcement structure a spiral spacer in the form of a light, vertical channel in which at the requisite distances lugs had been punched, and in the fabrication of the structure the lugs were forced around the spiral rod holding it rigidly in place. There were two such channels used for spiral spacing, placed on opposite sides of the spiral. The reinforcing rods were six in number and were kept in place by annealed wire binding them to the spiral at selected intersections. By using the spiral spacer it was not necessary to tie the reinforcing rods at every intersection with the spiral rod, and it was not done.

No order was issued by the contracting officer requiring the use of a spiral spacer.

A spiral spacer was commonly used in such structures and was more practical than annealed wire.

January 9, 1935, the plaintiff submitted to the constructing quartermaster a claim for extra compensation for the

use of spiral spacers in the amount of $184.80, on which there appears to have been no action.

Accurate placing and securing of the spiral without the use of a spiral spacer would have been an expense to the plaintiff which under the circumstances it did not occur.

There is no proof of the final extra expense, if any, that plaintiff was put to, by reason of using a spiral spacer.

4. *Bricklayers' wages*, $1,036.61.

Article 18 of the contract, insofar as may here be pertinent, provided as follows:

> *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:
>
> | | |
> |---|---|
> | Skilled labor | $1.00 |
> | Unskilled labor | .40 |
>
> • • • • • •
>
> (c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.
>
> • • • • • •
>
> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

On March 3, 1934, the Board of Labor Review of the Federal Emergency Administration of Public Works, in connection with another project for Army construction at San Antonio, Texas, to which plaintiff was not a party, formally ruled that bricklayers employed thereon should be paid at the rate of $1.25 per hour, retroactively to February 2, 1934.

This decision was transmitted to the plaintiff by the constructing quartermaster March 20, 1934.

March 23, 1934, the constructing quartermaster advised plaintiff that all bricklayers employed on the project here in suit "will be paid at the rate of $1.25 per hour."

The plaintiff replied to this March 29, 1934, stating that it would be governed accordingly but under protest, and expected reimbursement of the difference of 25 cents per hour when the ultimate amount was ascertained.

On May 12, 1934, the constructing quartermaster advised the plaintiff that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicin-
46 ity should be paid $1.25 per hour, retroactive to February 2, 1934, and that plaintiff would be within its "rights to file appeal with the Board of Labor Review from the decision of the contracting officer."

On July 16, 1934, the constructing quartermaster transmitted to the plaintiff copy of an undated decision by the Assistant Secretary of War in another case that the War Department could not review the decisions of the Board of Labor Review.

The bricklayers were paid $1.25 per hour accordingly, instead of $1.00. The hours of labor amounted to 3,286½. At 25 cents an hour this amounts to $821.63. With 10 percent thereof for overhead and 10 percent of the aggregate for profit, this is increased to $994.17.

The issue as to whether bricklayers on the contract work here in suit should be paid $1.25 per hour or less was not submitted to the Board of Labor Review. The plaintiff has not been paid the said sum of $994.17, or any part thereof.

5. *Increase in lumber prices*, $2,704.20.

Article 7 (c) of the contract provided:

> *N. R. A. materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

The Code of Fair Competition for the lumber and timber products industry was approved by the President August 19, 1933, and went into effect August 29, 1933.

The plaintiff signed the President's Reemployment Agreement August 25, 1933, under the National Industrial Recovery Act.

On October 20, 1933, the Edward Hines Lumber Company furnished the plaintiff a quotation of unit prices on the kind of lumber called for under plaintiff's contract, "subject to change or previous sale without notice." The plaintiff based its bid on this quotation.

On October 30, 1933, the Lumber Code Authority published minimum prices on Southern Yellow Pine
47 lumber (used largely on plaintiff's contract) effective November 9, 1933, which had the effect of increasing prices in Edward Hines Lumber Company's quotation.

Bids were opened in the instant case November 20, 1933. By the time the plaintiff was ready to purchase the lumber the lumber company would not sell below the minimum prices established by the Code, by that time in effect, and plaintiff had to pay the higher prices.

The amount of this difference is $2,234.88. With ten percent overhead and ten percent profit on the aggregate, this would be increased to $2,704.20.

The plaintiff made no claim to the contracting officer for increased cost of lumber.

6. *Footing depths*, $5,793.19.

Articles 3 and 4 of the specifications provided:

> 3. *Excavation.*—Do all excavating of every description and of whatever substances encountered to the dimensions and levels shown. All excavated material, including top soil, shall be deposited around the buildings, where and as directed by the C. Q. M. Top soil shall be stacked separately.
>
> Excavations for footings shall be carried down to the depth and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.
>
> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.
>
> Care shall be taken not to excavate beyond the depths shown on drawings, as no backfilling under footings will be permitted, and any excess below the levels shown shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact undisturbed bottoms.
>
> All excavations shall be maintained in good order during the progress of the work, and, if necessary, sheet piling shall be used and maintained in position until removal is authorized by the C. Q. M.
>
> 4. Excavation for pier foundations will be made with a suitable boring machine acceptable to the C. Q. M. Such excavation will extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient
> 48 bearing value for the purpose intended. If wet or unstable materials are encountered in the process of boring holes, the excavation must be cased with metal casings of ample strength to prevent crushing. Casings may be collapsible or of one length.
>
> Ground water encountered must be kept from the excavation at all times. In no case will water be permitted to reach footing bottoms.
>
> At the contractor's option, reaming of conical shaped bottoms may be performed either by hand or mechan-

ical methods. For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

Paragraph 45 of the specifications provided:

CONCRETE WORK

* * * * * *

45. *Footing, etc.*—The Contractor shall see that the bottom of all excavations are of undisturbed soil, properly leveled before pouring footings.

Extension of foundations beyond dimensions given on the drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of the bid. If solid foundation is found at a lesser depth than the dimension given on the drawings, then a credit will be given the U. S., based on the "Unit Prices."

* * * * * *

The depth of footings was shown on the drawings as 33 feet from the finished floor of the building, and it was on this depth that plaintiff estimated its bid.

Soil beneath the projected houses was, when wet, shifting and unstable. Experience in the locality had demonstrated that building foundations were unsatisfactory when rested thereon, and that it was desirable for the footings to go below this uncertain soil to block clay having a good bearing value. The type of the footing in use to prevent movement of the foundation in wet weather was a reinforced concrete pier with a bell-shaped bottom resting on block clay, beams from pier to pier at the surface being wedged-shaped to escape the lifting action of the soil.

In the project here involved there were 16 piers to a house with depths from the first floor level ranging from 29 feet to 37.5 feet, with an average of 32.49 feet.

49 Plaintiff excavated to depths approved by the defendant's inspectors. In making payment under the contract the defendant withheld from the contract price the difference between actual excavation and 37 feet 6 inches, at the unit prices named in the contract. The applicable unit

prices were contained in the following clause of the contract:

> The following unit prices shall be used as a basis for making deductions from or additions to the contract price provided any deviation from the drawings and specifications decreases or increases the amount of work indicated or required herein. These prices shall include the furnishing of all labor and material complete in place unless otherwise noted.
>
> * * * * * * *
>
> (2) Excavation, in piers and bell foundations—$60.00 per cu. yd.
>
> * * * * * *
>
> (4) Concrete, Type B, in piers and bell $11.00 per cu. yd.
>
> (5) Reinforcing Steel—$60.00 per ton.
>
> * * * * * *

The adjustment made by the defendant was a net deduction of 1,279.47 linear feet, or $6,042.79, based on unit prices of $11 per cubic yard for concrete, $60 per ton for steel, and $60 per cubic yard for excavation, all computed on a pay basis of 37 feet, 6 inches. This deduction was calculated by the constructing quartermaster and applied by the paying officer. On a basis of 33 feet plaintiff's claim to recovery would be correctly stated at $5,793.19.

7. *Liquidated damages withheld*, $1,776.00.

The contract provided:

> The work shall be commenced December 18, 1933, and shall be completed September 24, 1934.
>
> The contractor shall pay to the Government as fixed, agreed and liquidated damages, the amount of Two Dollars ($2.00) per house for each calendar day of delay in the completion of the work herein, beyond the time stated herein for completion, not excusable pursuant to Article 9 hereof.

Article 9 of the contract provided:

> ART. 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part

thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight, embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to

the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

The various buildings were accepted by the constructing quartermaster, eight on November 16, 1934, and
51 eight on November 21, 1934, as tendered, a delayed completion of 53 and 58 days, respectively. At $2.00 per day per house the liquidated damages amounted to $1,776.00 and this amount was withheld from the contract price in the last settlement.

After the foundation piers were installed, progress was normal and the assessment and withholding of liquidated damages for delay was solely to cover alleged delay by the plaintiff in installing those piers, more particularly delay in the commencement of excavation for the piers.

The excavation was, for cylindrical piers 18 inches in diameter, increased to 4 or 5 feet at the bottom in the shape of a bell, to increase the bearing area.

For structural considerations boring of the hole could not vary from the perpendicular and top and bottom had to center nicely. The bell shape at the bottom of the excavation was cut out with a reaming arrangement lowered into the hole in the final boring. It was possible to excavate the bell shape by hand, but this method, due largely to the confined space, was awkward and inefficient and not ordinarily resorted to.

Excavations of this form were peculiar to areas having the foundation difficulties here present, and the work was a specialty. There were few concerns or individuals equipped and capable of making the necessary excavations.

On November 2, 1933, prior to the date of the contract in suit, the plaintiff had entered into a written agreement with The Excavating and Foundation Company, a Missouri Corporation, hereinafter referred to as the Excavating Company, whereby that company undertook, among other things, to excavate for the pier foundations, identical in all respects to the foundations of the 16 buildings here involved, of 59 similar nearby buildings which it was to con-

struct for the Army under a contract dated November 2, 1933, and which forms the subject matter of plaintiff's suit against the defendant in case docketed No. 43812 in this Court. This is referred to as the "59" contract.

The plaintiff made arrangements to have the Excavating Company do the same work on the 16 buildings involved in the instant case, for convenience referred to as the "16" contract. The particulars of that arrangement do not ap-

52 pear except that the plaintiff considered it a continuation of the excavating work required by its subcontract with the Excavating Company on the "59" contract. The constructing quartermaster approved the Excavating Company as subcontractor on the "16" contract.

At the time it entered into the excavating agreement on the "59" contract, the Excavating Company was doing identical work on a nearby project (herein referred to as the "S. & W." contract), under the jurisdiction of the same constructing quartermaster in charge of the "16" and "59" contracts. In beginning the "S. & W." contract work the Excavating Company had run into two or three weeks' difficulties due to its own inexperience and lack of appropriate equipment. At the request of the contractor the Excavating Company called in to its assistance one A. H. Beck of San Antonio, Texas, an individual trading as A. H. Beck Foundation Company, hereinafter referred to as the Beck Company, who was experienced and well-equipped, and to whom the Excavating Company sublet half of the "S. & W." contract work. By that time the Excavating Company had perfected its equipment, was operating efficiently, and was prepared to do the work on the "59" contract.

In order to begin work on the "59" contract promptly the Excavating Company had prepared an extra rig, similar to the two it was using on the "S. & W." contract. In excavating, the physical work was done by common labor.

Work on the superstructures was wholly dependent upon the foundations, and plaintiff urged the Excavating Company to get started on the agreed excavation. The con-

structing quartermaster would not permit the Excavating Company to proceed with the "59" contract until the work it was doing on the "S. & W." contract was completed, nor would he permit the Excavating Company to begin work on the "16" contract until its work on the "59" contract had been completed. In neither the "16" nor the "59" contract would he permit the Excavating Company to make use of the extra rig, prepared especially for the Holpuch jobs.

The constructing quartermaster insisted that the Beck Company be given the work on the two Holpuch jobs, the "59" and the "16", and, in order to extricate itself from these difficulties, the Excavating Company sublet its entire work on the "59" job to the Beck Company, and the
53 Beck Company in course of time performed it. After extended negotiations the plaintiff sublet the excavating work on the contract in suit, the "16" contract, to the Beck Company May 14, 1934, and the Beck Company in course of time performed it.

The delay for which liquidated damages were assessed and withheld was due solely to the constructing quartermaster's refusal to permit the Excavating Company to proceed with plaintiff's work when the plaintiff called upon it to do so.

This action upon the part of defendant's constructing quartermaster interfered with plaintiff's prosecution of its work, and prevented the plaintiff from completing the work by the agreed time.

The plaintiff did not notify the contracting officer of the cause of the delay in the time, manner, and form required by Article 9 of the contract.

8. The plaintiff appended to its last voucher for payment under the contract a list of the claims here in suit, covered by a note as follows:

> The acceptance of payment on this voucher is without prejudice to the right of the Contractor to submit its claims to the General Accounting Office as itemized on the attached paper.

There is no proof of submission of these claims to the General Accounting Office.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is entitled to recover $6,614.82.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of six thousand six hundred fourteen dollars and eighty-two cents ($6,614.82).

Opinion

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff contracted with the defendant November 29, 1933, to construct 16 company officers' quarters at Fort Sam Houston, Texas. It was a Federal Emergency Administration of Public Works project.

54 The work required of the plaintiff construction of the foundations, as well as of the superstructure. Subsurface conditions were of an unstable nature and the contract specified concrete piers for the foundations with reinforcing steel. The reinforcing steel was, as the findings state, a structure within itself, and had to be rigid in order to withstand the displacing action of pouring and puddling of concrete. This reinforcing structure consisted of spirals and uprights and a controversy arose as to the means of securing spiral and upright together in such manner as to assure regularity and rigidity. Defendant's officers insisted that plaintiff was required to use what is termed a "spiral spacer." The plaintiff objected, but furnished and used it. The plaintiff claims extra compensation for having done so, but its claim fails for one reason, if no other. The extra expense entailed is not satisfactorily proven. The extra expense, if any, may not have been easy to prove, but the proof must at least give us the obvious offsets, such as the expense of an alternative method of accurately placing and securing the spiral. The spiral did have to be accurately placed and secured by some method. The plaintiff is not entitled to recover on this item.

The matter of bricklayers' wages, which plaintiff paid in excess of that which it had expected to pay, is more difficult of determination.

Bricklayers are skilled laborers and the contract provided that skilled labor should be paid not less than $1.00 an hour, but enough to make their wages just and reasonable, "sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort."

There were further provisions. Wages should not fall short of rates agreed upon between labor unions and employers, prevailing on April 30, 1933.

Article 18 (e) (f) of the contract provided:

> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs of the project to the contractor, whether under this contract or any subcontract.
>
> (f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

The plaintiff was charged with notice as to the union scale in effect April 30, 1933, for its contract was not entered into until the following November. Plaintiff was safeguarded against a future rise in wages effected by the Federal Emergency Administration of Public Works and the Board of Labor Review, for adjustment of the contract price to meet the increase was mandatory.

While plaintiff's work was in progress the Board of Labor Review ruled that bricklayers' wages on another Government job at San Antonio should be $1.25 an hour. This ruling the constructing quartermaster communicated to the plaintiff, and ordered plaintiff to increase bricklayers'

wages to $1.25 an hour accordingly. Plaintiff put the increase into effect, under protest, and gave notice of claim for the difference between the original minimum of $1.00 and the new scale of $1.25.

The plaintiff was informed by the constructing quartermaster that he might appeal to the Board of Labor Review. But it was plainly of no special interest to plaintiff to make such an appeal, for the contract provided an automatic increase in contract price to cover such an increase in wages. Increasing the wages increased the contract price, without further order.

The constructing quartermaster construed the ruling of the Board of Labor Review to apply to the vicinity of San Antonio, and this was a reasonable construction to make for the wages prevailing in the vicinity were the wages to apply to a contract within that vicinity, and Fort Sam Houston and San Antonio are in the same vicinity.

The ordered increase of 25 cents an hour in the wages increased the contract price under the terms of Article 18 (e) of the contract, and the plaintiff is entitled to recover $821.63. Overhead and profit may not be included. The adjustment in contract price is limited to the consideration of "actual" labor costs.

The next item is an increase in lumber prices due to the fact that one of plaintiff's material men increased the price of lumber over the original quotation. The lumber company increased its prices because of the lumber code, a feature of the national industrial recovery program. But there is no provision in the contract in suit which passes such an increase on to the defendant. And the plaintiff can not of course sue under the act of June 25, 1938, 52 Stat. 1197, for the contracts covered by that act had to be entered into on or before August 10, 1933, and plaintiff's contract was not entered into until November 29, 1933. As a matter of fact the Lumber Code Authority published its code prices October 30, 1933, and in the instant case bids were not opened until November 20, 1933. There is discoverable no legal basis for plaintiff's claim for increase in lumber

prices, and the item can not be included in a judgment in plaintiff's favor.

The next item is for an alleged short payment on footing depths.

Pier foundations were required, and the footings were to rest on undisturbed soil. The specifications provided:

> Excavations for footings shall be carried down to the depth and level shown on the drawings.

The depth of excavations for footings was shown on the drawings as 33 feet from the finished floor of the building. The specifications went on to provide:

> However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M. [meaning the constructing quartermaster].
>
> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.

In spite of the fact that the footing depths were shown on the drawings as 33 feet, and that the excavations were required by the above provision to be carried down to the depths shown on the drawings, deeper if necessary, the specifications in the immediately succeeding section provided:

> 57 For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

Here is an inconsistency. The pay basis was to be, by reference to the drawings, 33 feet, then the pay basis is declared to be 37 feet 6 inches.

It is manifest that the uniformity of depth shown on the drawings, 33 feet, was not expected to be attained for the specifications required the excavation to "extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended."

Thus a variation in depth was clearly contemplated, and indeed the provision that should suitable bearings not be encountered at the levels shown on drawings, they should be carried to such levels as might be necessary and approved by the constructing quartermaster, indisputably confirms the probability of variation. So that the 33-foot depth shown on the drawings was at most merely an average depth.

And it very nearly turned out to be that way, for the average depth finally was 32.49 feet.

It happened that the maximum depth excavated for the foundations was 37 feet 6 inches, the minimum 29 feet. In settlement for the work defendant's officers deducted the unit prices provided for that purpose, for the presumed saving or shortage in excavation between the maximum of 37 feet 6 inches and the minimum of 29 feet, calculated, of course on the actual footage.

The plaintiff contends that the pay basis should be 33 feet and not 37 feet 6 inches.

This was not a controversy over what work the contract and its specifications required. It is a question of how the contract price is to be computed. The contract indicates on its face that it is "To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, Texas." So the responsibility for making correct payment was on the Finance Officer, the paying officer and, of course, bonded.

The Finance Officer's payment of the contract price must necessarily have been his own responsibility. The decision of the contracting officer as to the amount thereof
58 would have been advisory, at the most, and there was no appealable decision confronting the plaintiff.

The 33-foot and 37-foot 6-inch provisions are so close together in the wording of the contract they must be read together. The plaintiff had as full a notice of the 37-foot 6-inch provision as it had of the 33-foot and may not say it was misled.

It is impossible to reconcile the two provisions. The 33-foot pay basis is the more logical of the two, for the 33 feet were shown on the drawings and that turned out to be

approximately the average, and such a pay basis would involve both deductions and additions to the contract price. The "33 feet" shown on the drawings was not a required minimum, for the actual and accepted minimum depth was 29 feet.

On the other hand, the 37-foot 6-inch pay basis was the actual accepted maximum, and used as a pay basis that meant deductions only from the contract price, no additions whatever.

The two contract provisions do not fit into each other. If one is adopted it must be to the exclusion of the other. There is no ambiguity about either one, taken by itself. But there is this to be said about the 33-foot pay basis—it involved additions to as well as deductions from the contract price when the work was done and the accounts cast up. By using the 37-foot 6-inch pay basis there resulted no additions whatever to the contract price, only deductions, a one-sided proposition, somewhat to plaintiff's discomfiture. It was superfluous to talk about additions to the contract price, if there were to be none.

Logic and reason tip the balance in favor of the 33-foot pay basis, for that basis permits additions as well as deductions, which the other basis does not, and put to the selection, the 33-foot basis must prevail, to the exclusion of the other.

On the 33-foot basis the recovery would be $5,793.19, and the plaintiff is entitled thereto.

The last item to be considered is the claim of $1,776.00 for liquidated damages alleged to have been improperly withheld. The history of the delay for which liquidated damages were assessed is given in some detail in the find-
59 ings of fact. They reveal that the constructing quartermaster took things into his own hands, giving precedence to excavating work on other contracts, preventing the plaintiff from getting its own subcontractor working on the project with which we are here concerned. The order in which the excavation was thus required to proceed was for the Government's convenience, and while it may have expedited work on other contracts, its effect was to

delay plaintiff's work and was chargeable to the acts of the Government, for which plaintiff was not responsible. The delay was plainly excusable under the terms of Article 9 of the contract, and gave no basis for withholding liquidated damages. There was no administrative finding as to the causes of the delay from which the plaintiff might appeal.

Up to that point the case is all for the plaintiff, but the plaintiff neglected to set in motion its right to remission of liquidated damages, for it did not notify the contracting officer as to the delay as required by Article 9 and thus place upon the contracting officer the duty of investigating the matter, and extending the time for performance. The Government reserved the right to have the contracting officer investigate the matter, if the contractor was to have liquidated damages remitted. Having failed to prepare the necessary foundation for its claim, the plaintiff could not expect the paying officer to do aught else than withhold the liquidated damages, and the plaintiff may not recover them.

Plaintiff is entitled to recover $6,614.82. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge;* and WHITAKER, *Judge,* took no part in the decision of this case.

61 *Note re Exhibits*

The contract, specifications, schedules and drawings made a part of these findings by reference accompany this record under separate cover. (See Stipulation.)

63 *Judgment of the court—May 7, 1945*

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is entitled to recover $6,614.82.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of six thousand six hundred fourteen dollars and eighty-two cents ($6,614.82).

65 *Proceedings after entry of judgment*

On July 6, 1945, defendant filed a motion for extension of time (to July 7, 1945) within which to file motion for a new trial, which was allowed July 7, 1945.

On July 7, 1945, defendant filed a motion for new trial.

On October 1, 1945, the court filed the following order on defendant's motion for new trial:

ORDER

It is ordered this 1st day of October, 1945, that defendant's motion for new trial be and the same is overruled.

66 [Clerk's certificate to foregoing transcript omitted in printing.]

68 IN THE SUPREME COURT OF THE UNITED STATES

Stipulation Not to Print Exhibits

It is hereby stipulated by and between counsel for the parties in the above-entitled cause that the exhibits filed by the parties in the cause in the Court of Claims which are a part of the record of said cause in said court and which by reference are made a part of the Special Findings of Fact of said court need not be printed as part of the record in the above-entitled cause in this Court, but shall nevertheless be considered as part of the record and may be referred to by the Court and by counsel in the briefs and on oral argument.

HOWARD MCGRATH,
Solicitor General.

NORMAN B. FROST,
Counsel for Respondent.

Supreme Court of the United States

[illegible]

Filed March 3, 1941.

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[redacted] COPY.

[redacted] OF RECORD

[redacted] UNITED STATES

Supreme Court of the United States

OCTOBER TERM, 1945

No. 697

THE UNITED STATES, PETITIONER

vs.

JOSEPH A. HOLPUCH COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 43812

JOSEPH A. HOLPUCH COMPANY,
A CORPORATION,

vs.

UNITED STATES OF AMERICA

Petition Filed January 12, 1938

To the Honorable the Judges of the United States Court of Claims:

The petition of JOSEPH A. HOLPUCH COMPANY, a corporation, respectfully shows:

I

That petitioner is a corporation organized and existing under the laws of the State of Illinois; that it has at all times borne true faith and allegiance to the Government of the United States of America, and has in no way aided, abetted, or given encouragement to rebellion against said Government.

II

2 Under date of June 15, 1933, the War Department, Office of the Quartermaster General, Construction Division, issued specifications for the construction of 59 Two-story Company Officers' Quarters at Fort Sam Houston, Texas, to which specifications were added Addenda No. 1 on October 2, 1933, Addendum No. 2 on October 6, 1933, Addenda No. 3 on October 9, 1933, Addendum No. 4 on October 10, 1933, Addendum No. 5 on October 11, 1933, Addendum No. 7 on October 19, 1933, Addendum No. 8 on October 21, 1933, Addendum No. 9 on November 9, 1933, and Addendum No. 10 on November 13, 1933, all of which became part of the specifications, said specifications being described and identified as No. QM-8.

That an invitation for bids for the doing of said work was issued on October 6, 1933, and that said bids were opened on October 20, 1933; that petitioner having submitted the lowest satisfactory bid for the work contemplated by said specifications, a formal contract, upon U. S. Government Standard Form No. P. W. A. 51 and identified as contract No. W 6278, QM 108, was entered into between petitioner and the United States of America (hereinafter for brevity sometimes referred to as "the Government") on November 2, 1933. A copy of said contract is attached hereto, marked Petitioner's Exhibit "A" and is prayed to be taken and read as a part hereof.

That the contract, specifications, plans and drawings governing the work were prepared and drawn by the defendant.

III

3 That at or about the time said contract was entered into, petitioner was given orders by the Government to proceed with the work specified in the contract not later than November 16, 1933, and it did thereupon begin the work and carried on same promptly and efficiently, except when it was interrupted in so doing by acts and omissions on the part of the Government, as hereinafter set forth; that the contract provided that petitioner furnish all labor and materials and perform the work required by said contract for the sum of Six Hundred Sixty-eight Thousand, Seven Hundred Sixty-five Dollars ($668,765), in accordance with the plans and specifications.

That the specifications provided that the work be under the control of the Constructing Quartermaster and that Captain A. F. Dershimer was designated as such Constructing Quartermaster in charge of the work specified in said contract, and that said Captain A. F. Dershimer acted as such Constructing Quartermaster and representative of the Government during the entire construction period.

Petitioner proceeded with the work and construction progressed normally except at such times as petitioner was interrupted, hindered, delayed and prevented from so pro-

ceeding by changes in plans, drawings and specifications and because the Government would not allow petitioner to proceed with the excavation of piers, as hereinafter set forth.

IV

Part of the work required by the contract consisted of installing spiral spacers of reinforcing steel in all piers. Paragraph 24, page 11, of the specifications is as follows:

> 24. *Placing:* Metal reinforcement shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suitable clips at intersections, and shall be supported by concrete or metal chairs or spacers, or metal hangers.

In the doing of the work petitioner prepared to tie and secure said spiral reinforcing steel to vertical steel by using annealed steel wire of not less than No. 18 gauge, and made all arrangements for doing so in accordance with the plans and specifications.

The Constructing Quartermaster refused to allow petitioner to tie and secure said reinforcing steel spirals to vertical steel by using annealed steel wire, but required and insisted that petitioner furnish and install a special patented metal spacer or clip. Petitioner protested to doing so and advised the Constructing Quartermaster that, in order to substitute metal spacers in lieu of annealed steel wire of not less than No. 18 gauge to tie and secure said spirals to vertical steel, it would require extra compensation and a change order. The Constructing Quartermaster refused to issue such change order and refused to allow petitioner to proceed with the work unless petitioner furnished and installed said metal spacers to tie and secure reinforced steel spirals to vertical steel. That the cost to petitioner for installing said metal clamps or clips, over and above the cost of tying and securing spiral reinforcing steel to vertical steel with annealed steel wire of not less than No. 18 gauge, was Six Hun-

dred Eighty-one Dollars and Forty-five Cents ($681.45), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who declined said claim. That payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of Six Hundred Eighty-one Dollars and Forty-five Cents ($681.45), for which petitioner asks judgment.

V

At the time the contract was entered into, the rate and scale of wages for skilled mechanics had been established at Fort Sam Houston, being the zone and area where this work was to be performed. Said scale and rate supplied to petitioner and so established at that time provided for a minimum rate of wage to be paid to bricklayers of $1.00 per hour.

Section (e), Article 18 of the specifications, provides as follows:

> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

6 After the work was in progress, and on or about July 16th, the Government notified petitioner that there had been a ruling made by the Board of Labor Review fixing and establishing the minimum rate of wage for bricklayers in the area and zone where the work was to be done at $1.25 per hour, and required petitioner to pay said rate of $1.25 per hour in the future and from the date of said ruling, to all laborers employed as brick-

layers on said project. That the difference between the minimum rate of $1.25 per hour as fixed by the ruling of the Board of Labor Review and $1.00 per hour, which was the minimum rate of wage given to petitioner and established for the zone and area in which the work was being done, was Four Thousand, One Hundred Sixty-two Dollars and Sixteen Cents ($4,162.16), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who declined said claim. That payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of Four Thousand, One Hundred Sixty-two Dollars and Sixteen Cents ($4,162.16), for which petitioner asks judgment.

VI

The contract between petitioner and the defendant contained the following provisions:

> ART. 7. (c) *NRA materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.
>
> ART. 18. *Wages.*—(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

The Contracting Officer did not certify that compliance with the National Industrial Recovery Act in reference to the purchase of lumber for this project was not in the public interest or that the consequent cost would be unreasonable.

By the terms of the contract petitioner was required to comply with the terms of the National Industrial Recovery Act, which was in force at the time said contract was entered into and during the time that the work provided for in the contract was in progress. Petitioner was also required to observe all codes of fair competition and executive orders and rules in force at the time said contract was entered into and that might subsequently, from time to time, be enacted or issued.

At the time petitioner estimated the cost of doing the work provided for in the contract and submitted its bid, petitioner secured a proposal from Edward Hines Lumber Company, a reliable and responsible dealer in lumber, to furnish all lumber required to do said work provided for in the contract at the then prevailing prices. No codes of fair competition had been established or published for the lumber or timber industries at the time said proposal was secured and when said
8 contract between petitioner and the defendant was entered into. After said contract was entered into, a code known as "Code of Fair Competition" was established and published and provided that all dealers in lumber observe and comply with same; that by said code and under the rulings of the Lumber Code Authority, minimum prices were established for lumber, which prices were higher than those contained in the proposal that petitioner had secured from said Edward Hines Lumber Company and upon which it based its estimate and bid; that the increase in prices applied to all dealers in lumber who complied with the National Industrial Recovery Act and was uniform; that said code became effective November 9, 1933.

In order to comply with the terms of its contract and observe the provisions of the National Industrial Re-

covery Act, petitioner was compelled to pay the increased price of lumber for all lumber required in the completion of the work provided for in the contract, and the amount petitioner was compelled to pay for lumber to complete said contract, over and above the amount it could and would have secured said lumber for, except for the increased price established and fixed by the Code of Fair Competition applicable to the lumber and timber industries and the rulings of the Lumber Code Authority, was Nine Thousand, Nine Hundred Seventy-one Dollars and Seventy-six Cents ($9,971.76), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who declined said claim. That payment of the whole,
9 or any part thereof, has been refused, to petitioner's damage in the sum of Nine Thousand, Nine Hundred Seventy-one Dollars and Seventy-six Cents ($9,971.76), for which petitioner asks judgment.

VII

Under the heading of "Excavating, Filling, Grading," etc. of the specifications, appearing on page 8 and 9 of said specifications, the manner of doing excavating work necessary in connection with the work to be done under said contract, was defined. Under "Excavation," said specifications provided as follows:

> Excavations for footings shall be carried down to the depths and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.
>
> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the United States as per amount mentioned for excavating under "Unit Prices" of bid.

The unit price for pier excavation and bell foundations in the bid was $1.50 per cubic yard. The unit price for concrete, Type B, in piers and bell was $11.00 per cubic yard. The price for reinforcing steel in said bid was $60.00 per ton.

Plan No. 31-1-A, covering this work, provides and shows that piers are to be 33 feet to finished floor, said depth to reach to the bottom of the foundation bell.

In doing the excavating work the depths required on certain piers were less than 33 feet and, as to the balance, the depths required were in excess of 33 feet.

10 Petitioner submitted its statement for said excavation when same was completed for approval, giving credit to the Government, as provided for by the specifications and according to the bid price, where piers were less than 33 feet in depth, and claiming compensation for such piers where the depths required were in excess of 33 feet. That the additional amount to which petitioner is entitled for excavating, placing of reinforcing steel and filling same with tremie concrete, over and above the amount allowed for piers at a depth of 33 feet and after giving to the United States credit on those piers where the depths were less than 33 feet, is Four Thousand, Nine Hundred Twenty-two Dollars and Eighty-seven Cents ($4,922.87), which is a reasonable and fair charge.

Petitioner presented its claim to the War Department for said amount, who directed petitioner to submit said claim to the Comptroller General; whereupon petitioner submitted said claim to the Comptroller General, who declined said claim. That payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of Four Thousand, Nine Hundred Twenty-two Dollars and Eighty-seven Cents ($4,922.87), for which petitioner asks judgment.

VIII

The contract between petitioner and the defendant imposed upon the defendant an obligation that it would not hinder or delay petitioner in the doing of the work con-

templated by the contract so that petitioner could proceed with its work in an orderly, unobstructed, usual, customary and economical manner and in sequence. Petitioner was unable to so proceed and complete its work
11 due to the failure of the defendant to observe and carry out this obligation and was continuously hindered and delayed by the defendant in the doing of said work, as hereinafter set forth.

The excavation for piers required in connection with this work, in view of the nature of the work, terra, subsoil and general conditions, was required by the contract to be done in a particular manner and with machinery and equipment especially designed and made for that type of work.

The amount of such equipment in the United States was very limited and it would have required a long period of time to manufacture and produce such equipment. When the contract was entered into, petitioner entered into a subcontract with the Excavation and Foundation Company of St. Louis, Missouri, who also had a contract for excavation with the S. & W. Construction Company of Memphis, Tennessee, who were engaged in the doing of similar work, under separate contract, at Fort Sam Houston, Texas, which said contract was being worked simultaneously with the contract of petitioner.

It was contemplated that excavation on all projects be done at approximately the same time, with the equipment which the Excavation and Foundation Company of St. Louis owned and had available. It had been arranged that certain excavations for piers be made on all buildings. When said Excavation and Foundation Company endeavored to excavate for piers under petitioner's contract, however, the Constructing Quartermaster refused to allow petitioner's subcontractor to do so and refused to allow it to move its equipment from the project under contract with the S. & W. Construction Company to the site of the work under petitioner's contract, notwith-
12 standing that at times much of the equipment on the site of the project under contract with the S. &

W. Construction Company was idle and could well have been used and employed in excavating work under petitioner's contract.

Petitioner and its subcontractor, Excavation and Foundation Company, repeatedly requested to be allowed to excavate for piers and move the equipment accordingly, but the Constructing Quartermaster persisted in his refusal and insisted that petitioner employ another excavating contractor, who was the only person, party or corporation who had any equipment suitable for this work other than the Excavation and Foundation Company. The work was of such a nature that no progress whatever could be made until the piers and foundations were excavated and poured, and the work under the contract was at a standstill during all the time that the Constructing Quartermaster refused to allow said excavation to be done. After a delay far in excess of the time for which liquidated damages have been charged herein, petitioner's subcontractor, Excavation and Foundation Company, employed the excavator submitted by the Constructing Quartermaster but petitioner sustained a severe loss during said suspension and delay of the work.

Petitioner therefore submits that, the delay having been caused by the defendant, through its representative, no liquidated damages should have been charged and that petitioner should be paid the sum of Three Thousand, Four Hundred Eighty Dollars ($3,480.00), withheld for liquidated damages.

That petitioner applied to the War Department for remission of the charge so wrongfully made as liquidated
13 damages, which in turn submitted said claim to the Comptroller General; that the Comptroller General declined said claim; that payment of the whole, or any part thereof, has been refused, to petitioner's damage in the sum of Three Thousand, Four Hundred Eighty Dollars ($3,480.00), for which petitioner asks judgment.

IX

Petitioner avers that there is due it from the Government under said contract, the following amounts above enumerated:

Additional expense to petitioner for labor and material in being required to furnish and install spiral spacers in piers, not required by contract, as shown in Paragraph IV of this Petition	$ 681.45
Additional cost to petitioner for wages required to be paid to bricklayers in accordance with ruling of the Board of Labor Review, as shown in Paragraph V of this Petition	4,162.16
Additional cost to petitioner in being required to pay increased price for lumber because of Code of Fair Competition under the National Industrial Recovery Act, as shown in Paragraph VI of this Petition	9,971.76
Balance due petitioner for excavation, as shown in Paragraph VII of this Petition	4,922.87
Balance due petitioner for amount illegally withheld as liquidated damages, as shown in Paragraph VIII of this Petition	3,480.00
Total	$23,218.24

14 Wherefore your petitioner claims that there is now justly due to it the sum of Twenty-three Thousand, Two Hundred Eighteen Dollars and Twenty-four Cents ($23,218.24), exclusive of all set-offs and just grounds of defense, which amount it is justly entitled to recover from the United States of America.

X

Your petitioner says that no assignment or transfer of its claim, or any part thereof, or any interest therein, has ever been made by it or on its behalf to anyone, and that it is entitled to recover from the United States of America the full amount of its claim as above set forth.

Wherefore, your petitioner prays judgment against the defendant, United States of America, for the sum of Twenty-three Thousand, Two Hundred Eighteen Dollars and Twenty-four Cents ($23,218.24), together with interest and its costs herein expended.

JOSEPH A. HOLPUCH COMPANY,
By JOSEPH A. HOLPUCH,
President.

GEORGE M. WEICHELT,
1111 The Rookery, Chicago, Illinois.

NORMAN B. FROST,
FRANK H. MYERS,
FREDERIC N. TOWERS,
723 15th Street N.W., Washington, D. C.

Attorneys for Petitioner.

15 [*Duly sworn to by Joseph A. Holpuch; jurat omitted in printing.*]

17 *Exhibit "A" to Petition*

W 6278 QM-108.

U. S. Government Form No. P.W.A. 51
Approved by the Federal Emergency Administrator of Public Works, September 7, 1933.

UNITED STATES GOVERNMENT FORM OF CONTRACT

(Federal Emergency Administration of Public Works Project)

War Department
Quartermaster Corps—Construction Service
(Department)

Joseph A. Holpuch Company
(Contractor)

Contract for The Construction of Fifty-Nine (59) Sets of Company Officers' Quarters, Two-Story Type.

Amount, $668,765.00.

Site of the work: Fort Sam Houston, Texas.

The services and supplies to be obtained from this instrument are authorized by, are for the purpose set forth in and are chargeable to Procurement Authority QM 7315 P1-3211 A640-35 NIR WAR QMC 1933-35, the available balance of which is sufficient to cover cost of same.

To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, Texas

THIS CONTRACT, entered into this 2nd day of November, 1933, by THE UNITED STATES OF AMERICA, hereinafter called the Government, represented by the contracting officer executing this contract, and Joseph A. Holpuch Company, a corporation organized and existing under the laws of the State of Illinois, of the city
18 of Chicago, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. *Statement of work.*—The contractor shall furnish all labor and materials, and perform all work required for The Construction of Fifty-Nine (59) Sets of Company Officers' Quarters (Two-Story Type) Fort Sam Houston, Texas

59 houses @ $11,225.00	$662,275.00
Install Warm Air Heating System—59 houses @ $65.00—add	3,835.00
Install linoleum floor covering in kitchen, pantry and kitchen store rooms—59 houses @ $45.00—add	2,655.00

for the consideration of Six Hundred Sixty-Eight Thousand Seven Hundred Sixty-Five and no/100 Dollars—($668,765.00) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows:

Specifications No. Q.M. 8.
Addenda Nos. 1 to 8 incl.
Drawings Nos. 31-1-A; 31-1-B; 31-1-C; 31-1-D; 31-1-E.

The work shall be commenced November 16, 1933 and shall be completed October 28, 1934.

The Contractor shall pay to the Government as fixed, agreed and liquidated damages, the amount of Two Hundred Thirty-Six ($236.00) Dollars for each calendar day of delay in the completion or acceptance of this work, beyond the date stated herein for completion, subject to the provision of Article 9 of this contract. In the event that one or more of the sets are completed at the time for completion mentioned herein, the fixed and agreed

amount of liquidated damages ($236.00) will be reduced at the rate of Four Dollars ($4.00) per set per day for each set completed on time.

19 Sheet No. 2 (a)

UNIT PRICES

The following unit prices shall be used as a basis for making additions to or deductions from the contract price, provided any deviation from the drawings and specifications increases or decreases the amount of work indicated and required therein. These prices shall include the furnishing of all labor and material complete in place, except as otherwise noted.

(1) Excavation, Gravel or Clay—Seventy-Five Cents (0.75) per cu. yd.
(2) Excavation in piers and bell foundations One and 50/100.....Dollars ($1.50) per cu. yd.
(3) Concrete, Type B, in forms TEN.....Dollars ($10.00) per cu. yd.
(4) Concrete, Type B, in piers and bells ELEVEN.....Dollars ($11.00) per cu. yd.
(5) Reinforcing Steel SIXTY.....Dollars ($60.00) per ton.
(6) Brick in Walls THIRTY.....Dollars ($30.00) per M.
(7) Load Bearing Tile in Walls THIRTY-ONE CENTS.....($0.31) per sq. ft.
(8) Plastering SIXTY CENTS.....($0.60) per sq. yd.
(9) Stucco SEVENTY-FIVE CENTS.....($0.75) per sq. yd.

ART. 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from
20 time to time such detail drawings and other information as he may consider necessary, unless other-

wise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ART. 3. *Changes.*—The contracting officer may at any time, by a written order and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate
21 the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

ART. 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ART. 6. *Inspection.*—(*a*) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(*b*) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work.

Special, full size, and performance tests shall
22 be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(*c*) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the

actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(*d*) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

ART. 7. (*a*) *Materials and workmanship.*—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment, which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Ma-

chinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

(*b*) *Domestic materials.*—In the performance of this work the contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured
24 articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except as provided in the specifications.

(*c*) *NRA materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

(*d*) *Local preference.*—So far as practicable, and subject to the provisions of sections (*b*) and (*c*) of this article, preference shall also be given to the use of locally produced materials if such use does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the contracting officer.

ART. 8. *Superintendence by contractor.*—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

ART. 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension

thereof, or fails to complete said work within such time, the Government, may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine, and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the finding of fact justify such an extension and his findings of fact thereon shall be final and conclusive on the

parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ART. 10. *Permits, and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

ART. 11. (*a*) *Convict labor.*—No convict labor shall be employed on the project and no materials manufactured or produced by convict labor shall be used on the project.

(*b*) *Thirty-hour week.*—Except in executive, administrative and supervisory positions, so far as practicable and feasible in the judgment of the contracting officer, no individual directly employed on the project shall be permitted to work more than 30 hours in any 1 week: *Provided*, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days. This provision shall supersede the terms of any code adopted under title I of the National Industry Recovery Act.

(*c*) *Eight-hour law.*—No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than 8 hours in any 1 calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of $5 shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than 8 hours upon said work, and all penalties

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thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137), relating to hours of labor.

ART. 12. *Covenant against contingent fees.*—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

ART. 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ART. 14. *Officials not to benefit.*—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative.

subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

ART. 16. *Payments to contractor.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(*b*) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by
29 the contract: *Provided, however,* That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *And provided further,* That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(*c*) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(*d*) Upon completion and acceptance of all work required hereunder, the amount due the contractor under

this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

(*c*) The contracting officer may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed by the contractor or any subcontractor on the work, the difference between the rate of wages required by this contract to be paid laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

ART. 17. *Additional security.*—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

ART. 18. *Wages.*—(*a*) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.10
Unskilled labor	.45

(*b*) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by

and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which
31 shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

(*c*) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

(*d*) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers."

(*e*) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(*f*) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions
32 of the Board of Labor Review shall be binding upon all parties.

ART. 19. (*a*) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided*, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

(*b*) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however*, That organized labor, skilled and unskilled, shall not be required to register at such local employment agencies but shall be secured in the customary ways through recognized union locals. In the event, however, that qualified workers are not furnished by the union locals within 48 hours (Sundays and holidays excluded) after request is filed by the employer, such labor may be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and local unions, the labor preferences provided in section (*a*) of this article shall be observed.

(*c*) *Compliance with title I, N.I.R.A.*—The contractor agrees to comply with the conditions prescribed in sections 7(a)(1) and 7(a)(2) of title I of the National Industrial Recovery Act, and to cause all subcontractors to comply therewith.

ART. 20. *Human labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

ART. 21. *Compensation insurance.*—The contractor will furnish compensation insurance for employees on this work and comply with the workmen's compensation laws of the State, Territory, or district in which the work is to be performed, and will give proof of such adequate insurance satisfactory to the contracting officer.

ART. 22. *Persons entitled to benefits of labor provisions.*—The contractor will extend to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the contractor and such laborer or mechanic, or between any subcontractor and such laborer or mechanic.

ART. 23. *Inspection of records.*—The Federal Emergency Administrator of Public Works and the contracting officer, through their respective authorized agents, shall have access to all pay rolls, records of per-
34 sonnel, invoices of materials, and any and all other data relevant to the performance of this contract.

ART. 24. *Reports.*—The contractor will make report in triplicate monthly through the contracting officer, and cause all subcontractors to report in like manner, within 5 days after the close of each calendar month on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, and the man-hours work, wage scales paid to the various classes of labor, and the total expenditures for materials. He shall also furnish to the contracting officer the names and addresses of all subcontractors on the work at the earliest date practicable.

ART. 25. *Termination for breach.*—In the event any of the provisions of article 7 (*b*), (*c*), and (*d*), 11, 18-24, 26, of this contract are violated by the contractor or any subcontractor on the work, the contracting officer may terminate the contract by written notice to the contractor. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby; and the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

ART. 26. *Subcontractors.*—(*a*) The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such subcontractors, particularly articles 7 (*b*), (*c*) and (*d*), 11, 18-24.

(*b*) All bids submitted by subcontractors should state the minimum wage rates established in article 18 hereof.

(*c*) No subcontract shall be let to any subcontractor who has not signed and complied with the applicable code or codes of fair competition approved under title I of the National Industrial Recovery Act for the trade or industry or subdivision thereof to which his work relates, or, if there be no approvad code of fair competition for such trade or industry or subdivision, who has not signed and complied with the President's Reemployment Agreement.

ART. 27. *Accident prevention.*—The contractor shall at all times exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, State, and municipal safety laws and building and construction codes. All machinery and equipment and other physical hazards shall be guarded in accordance with safety codes approved by the American Standards Association, unless such codes are

incompatible with Federal, State, or municipal laws or regulations. Nothing in this article shall be construed to permit the enforcement of any laws, codes, or regulations herein specified by any except the contracting officer.

ART. 28. *Definitions.*—(*a*) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.

(*b*) The term "contracting officer", as used herein shall mean the officer who signs the contract on behalf of the Government, and shall include his duly appointed successor or his duly authorized representative.

36 ART. 29. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto:

ART. 30. *Patents.*—The Contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specifications, the use of which the contractor does not control.

IN WITNESS WHEREOF the parties hereto have executed this contract as of the day and year first-above written.

THE UNITED STATES OF AMERICA,
By P. W. GUINEY,
Brig. General, QMC., Chief, Construction Division.
(Official title)

JOSEPH A. HOLPUCH COMPANY,
Contractor.

By JOSEPH A. HOLPUCH, *Pres.*
4010 W. Madison St., Chicago, Ill.

Two witnesses:

ROSE LEBRECHT.
MARY STEKLAC.

I, Joseph H. Holpuch, certify that I am the secretary of the corporation named as contractor herein; that Joseph A. Holpuch, who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

37

JOSEPH A. HOLPUCH.

[CORPORATE SEAL]

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, ... who signed this contract for the ..... had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

.....
Contracting Officer.

This contract is authorized by the National Industrial Recovery Act, title II (Public, No. 67), approved June 16, 1933.

39 *General Traverse—Filed February 21, 1938*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

SAM E. WHITAKER,
Assistant Attorney General.

P.M.C.

Argument and submission of case

On January 9, 1945, the case was argued and submitted on merits by Mr. Norman B. Frost for plaintiff, and by Mr. W. A. Stern II for defendant.

41 *Special findings of fact, conclusion of law and opinion of the court by Whaley, Ch. J.—Filed May 7, 1945*

Mr. Norman B. Frost, for the plaintiff. *Mr. George M. Weichelt* was on the brief.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special Findings of Fact

1. Joseph A. Holpuch Company, plaintiff herein, is a corporation of the State of Illinois chartered to engage in the general building construction business.

2. On November 2, 1933, the plaintiff entered into a contract with the defendant, represented by P. W. Guiney, Brig. General, Q. M. C., Chief, Construction Division, as contracting officer, whereby, for a consideration of $668,765 the plaintiff as contractor agreed to furnish all labor

and materials, and perform all work required for the construction of 59 sets of company officers' quarters (two-story type), Fort Sam Houston, Texas, in accordance with specifications, schedules and drawings made a part of the contract. The contract was numbered W 6278 qm-108, and was on Government form P. W. A. 51 as a Federal Emergency Administration of Public Works project.

42 By the contract the work was to be commenced November 16, 1933, and be completed October 28, 1934, a period of 346 calendar days.

The contract, specifications, schedules and drawings are in evidence and made part hereof by reference.

Article 15 of the contract provided:

> *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Article G. C. 10 of the specifications provided:

> *Interpretation of Contract:* Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. [meaning defendant's constructing quartermaster] shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

Article 5 of the contract provided:

Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article G. C. 27 of the specifications provided:

Extras: No charge for any extra work or material will be allowed unless the same has been ordered in writing by the C. Q. M., and the price stated in such order.

3. *Spiral spacers*, $681.45.

Reinforcing steel in concrete foundation piers was specified by the contract. It consisted of a circle of six
43 parallel vertical rods, their surfaces deformed for binding effect, and a spiral encircling them, to which the rods were attached at regular intervals. With regard to this reinforcement Article 24 of the specifications provided:

Placing: Metal reinforcement shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suitable clips at intersections, and shall be supported by concrete or metal chairs or spacers, or metal hangers.

Article 36 thereof provided with respect to pouring of the concrete, that before pouring reinforcement should be thoroughly secured in position and approved by the constructing quartermaster.

Article 38 provided:

Compacting: Concrete during and immediately after depositing, shall be thoroughly compacted by means of suitable tools. The concrete shall be thoroughly worked around the reinforcement and around embedded fixtures, and into the corner of the forms.

The reinforcement required by the specifications was designed to constitute a structure within itself, of such rigidity as to withstand the displacing action of the pouring and puddling of concrete. This structure was fabricated in

twenty-foot sections, before being lowered down into the form for the pier. This form was a steel casing of the proper diameter and so equipped that it could be pulled after the concrete was poured. A tremie was used in the pouring. The reinforcing structure was "supported by concrete or metal chairs or spacers, or metal hangers," to keep it the proper distance from the surface of the concrete, in this case about two inches. There is no controversy over the requirement or fulfillment of this specification, immediately quoted above.

The provision that "metal reinforcement shall be accurately positioned and secured against displacement by using annealed steel wire of not less than No. 18 gauge, or suitable clips at intersections," had reference to the tying of spiral and vertical rods together at their intersections.

It was possible to secure rods and spiral at their intersections firmly with No. 18 annealed wire.

44 The parties' officers at the site were disagreed as to the interpretation of Article 24 of the specifications, plaintiff taking the position that the spiral might be held at its intersections with the vertical rods by annealed wire, defendant taking the position that so-called "spiral spacers," having the sole function of maintaining regularity in the spiral turns, were required. The plaintiff—ultimately furnished and used in the reinforcement structure a spiral spacer in the form of a light vertical channel in which at the requisite distances lugs had been punched, and in the fabrication of the structure the lugs were forced around the spiral rod holding it rigidly in place. There were two such channels used for spiral spacing, placed on opposite sides of the spiral. The reinforcing rods were six in number and were kept in place by annealed wire binding them to the spiral at selected intersections. By using the spiral spacer it was not necessary to tie the reinforcing rods at every intersection with the spiral rod, and it was not done.

No order was issued by the contracting officer requiring the use of a spiral spacer.

A spiral spacer was commonly used in such structures and was more practical than annealed wire.

January 9, 1935, the plaintiff submitted to the constructing quartermaster a claim for extra compensation for the use of spiral spacers, as follows:

> 385# spacers per building, 59 buildings, 22,715#, or 11,357.5 tons @ $60.00 per ton (unit price set out in contract), $681.45.

There appears to have been no action on this claim. Accurate placing and securing of the spiral without the use of a spiral spacer would have been an expense to the plaintiff which under the circumstances it did not incur. There is no proof of the final extra expense if any, that plaintiff was put to, by reason of using a spiral spacer.

4. *Bricklayers' wages*, $4,162.16.

Article 18 of the contract, insofar as may here be pertinent, provided as follows:

> *Wages.*—(a) All employees directly employed on the work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:
>
> Skilled labor ..... $1.
> Unskilled labor .....
>
> * * * * *
>
> (c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.
>
> * * * * *
>
> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works, acting on such recommendation establishes different minimum

wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

The minimum of $1.00 for skilled labor named in Article 18 (a) was modified by the parties to read "$1.00."

On March 3, 1934, the Board of Labor Review of the Federal Emergency Administration of Public Works, in connection with another project for Army construction at San Antonio, Texas, to which plaintiff was not a party, formally ruled that bricklayers employed thereon should be paid at the rate of $1.25 per hour, retroactive to February 2, 1934. This decision was transmitted to the plaintiff by the constructing quartermaster March 20, 1934.

46 March 23, 1934, the constructing quartermaster advised plaintiff that all bricklayers employed on the project here in suit "will be paid at the rate of $1.25 per hour."

The plaintiff replied to this March 29, 1934, stating that it would be governed accordingly but under protest, and expected reimbursement of the difference of 25 cents per hour when the ultimate amount was ascertained.

On May 12, 1934, the constructing quartermaster advised the plaintiff that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity should be paid $1.25 per hour, retroactive to February 2, 1934, and that plaintiff would be within its "rights to file appeal with the Board of Labor Review from the decision of the contracting officer."

On July 16, 1934, the constructing quartermaster transmitted to the plaintiff copy of an undated decision by the Assistant Secretary of War in another case that the War Department could not review the decisions of the Board of Labor Review.

The bricklayers were paid $1.25 per hour accordingly, instead of $1.00. The hours of labor amounted to 13,196. At 25 cents an hour this amounts to $3,299.00. With 10 per cent thereof for overhead and 10 per cent of the aggregate for profit, this is increased to $3,991.79.

The issue as to whether bricklayers on the contract work here in suit should be paid $1.25 per hour or less was not submitted to the Board of Labor Review.

The plaintiff has not been paid the said sum of $3,991.79, or any part thereof.

5. *Increase in lumber prices*, $9,971.76.

Article 7 (c) of the contract provided:

> *N. R. A. materials.*—Only articles, materials, and supplies produced under codes of fair competition approved under title I of the National Industrial Recovery Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the contracting officer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

47 The Code of Fair Competition for the lumber and timber products industry was approved by the President August 19, 1933, and went into effect August 29, 1933. The plaintiff signed the President's Reemployment Agreement August 25, 1933, under the National Industrial Recovery Act.

At the time bids were opened the Edward Hines Lumber Company furnished the plaintiff a quotation of unit prices on the kind of lumber called for under plaintiff's contract, "subject to change or previous sale without notice." The plaintiff based its bid on this quotation. The quotation was given plaintiff October 20, 1933.

On October 30, 1933, the Lumber Code Authority published minimum prices on Southern Yellow Pine Lumber (used largely in plaintiff's contract) effective November 9, 1933, which had the effect of increasing prices in Edward Hines Lumber Company's quotation.

By the time the plaintiff was ready to purchase the lumber the lumber company would not sell below the minimum

prices established by the Code, by that time in effect, and plaintiff had to pay the higher prices.

The amount of this difference is $8,241.12. With ten per cent overhead and ten per cent profit on the aggregate, this would be increased to $9,971.75.

The plaintiff made no claim to the contracting officer for increased cost of lumber.

6. *Footing depths*, $4,922.87.

Articles 3 and 4 of the specifications provided:

> 3. *Excavation:* Do all excavating of every description and of whatever substances encountered to the dimensions and levels shown. All excavated material, including top soil, shall be deposited around the buildings, where and as directed by the C. Q. M. Top soil shall be stacked separately.
>
> Excavations for footings shall be carried down to the depth and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.
>
> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per
48 amount mentioned for excavating under "Unit Prices" of bid.
>
> Care shall be taken not to excavate beyond the depths shown on drawings, as no backfilling under footings will be permitted, and any excess below the levels shown shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact undisturbed bottoms.
>
> All excavations shall be maintained in good order during the progress of the work, and, if necessary, sheet piling shall be used and maintained in position until removal is authorized by the C. Q. M.
>
> 4. Excavation for pier foundations will be made with a suitable boring machine acceptable to the C. Q. M. Such excavation will extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended. If wet or unstable materials are encountered in the process of boring

holes, the excavation must be cased with metal casings of ample strength to prevent crushing. Casings may be collapsible or of one length.

Ground water encountered must be kept from the excavation at all times. In no case will water be permitted to reach footing bottoms.

At the contractor's option, reaming of conical shaped bottoms may be performed either by hand or mechanical methods. For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

Paragraph 45 of the Specifications provided:

CONCRETE WORK

45. *Footings, etc.:* The Contractor shall see that the bottom of all excavations are of undisturbed soil, properly leveled before pouring footings.

Extension of foundations beyond dimensions given on the drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of the bid. If solid foundation is found at a lesser depth than the dimension given on the drawings, then a credit will be given the U. S., based on the "Unit Prices."

* * * * *

49. The depth of footing was shown on the drawings as 33 feet from the finished floor of the building, and it was on this depth that plaintiff estimated its bid.

Soil beneath the projected houses was, when wet, shifting and unstable. Experience in the locality had demonstrated that building foundations were unsatisfactory when rested thereon, and that it was desirable for the footings to go below this uncertain soil to block clay having a good bearing value. The type of footing in use to prevent movement of the foundation in wet weather was a reinforced concrete pier with a bell-shaped bottom resting on block clay, beams from pier to pier at the surface being wedge-shaped to escape the lifting action of the soil.

In the project here involved there were 16 piers to a house

with depths from the first floor level ranging from 27.58 feet to 42.42 feet, with an average of 34.43 feet.

Plaintiff excavated to depths approved by the defendant's inspectors. In making payment under the contract the defendant made extra allowance to the plaintiff for excavation in excess of 37 feet 6 inches from the first floor level, and withheld from the contract price the difference between actual excavation and 37 feet 6 inches where actual excavation was less than 37 feet 6 inches, all at the unit prices named in the contract. The applicable unit prices were contained in the following clause of the contract:

> The following unit prices shall be used as a basis for making additions to or deductions from the contract price, provided any deviation from the drawings and specifications increases or decreases the amount of work indicated and required therein. These prices shall include the furnishing of all labor and material complete in place, except as otherwise noted.
>
> • • • • • •
>
> (2) Excavation in piers and Bell foundations One and 50/100 Dollars ($1.50) per cu. yd.
>
> • • • • • •
>
> (4) Concrete, Type B, in piers and bells Eleven Dollars ($11.00) per cu. yd.
>
> (5) Reinforcing Steel Sixty Dollars ($60.00) per ton.
>
> • • • • • •

50 The adjustment made by the defendant was a net deduction of 2,892.16 linear feet, or $1,444.20, based on unit prices of $11 per cubic yard for concrete, $60 per ton for steel, and $1.50 per ton for excavation, all computed on a pay basis of 37 feet 6 inches. This deduction was calculated by the constructing quartermaster and applied by the paying officer. On a basis of 33 feet plaintiff's claim to recovery would be correctly stated at $4,922.87.

7. *Liquidated damages withheld*: $3,480.00.

The contract provided:

The work shall be commenced November 16, 1933, and shall be completed October 28, 1934.

The contractor shall pay to the Government as fixed, agreed and liquidated damages, the amount of Two Hundred Thirty-six ($236.00) Dollars for each calendar day of delay in the completion or acceptance of this work, beyond the date stated herein for completion, subject to the provision of Article 9 of this contract. In the event that one or more of the sets are completed at the time for completion mentioned herein, the fixed and agreed amount of liquidated damages ($236.00) will be reduced at the rate of Four Dollars ($4.00) per set per day for each set completed on time.

Article 9 of the contract provided:

ART. 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the
51 contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the

work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemices, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays, of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

July 2, 1934, the Quartermaster General issued an order increasing the time for completion by 15 days to cover change in size of six bells on each house. Fifteen days additional time would bring the completion date to November 12, 1934.

The various buildings were accepted by the constructing quartermaster as of the following dates in 1934, and in numbers as indicated:

	Number
November 1	5
November 8	7
November 13	6
November 16	6
November 24	7
November 29	6
December 7	5
December 11	5
December 13	6
December 15	6
	59

52 The parties to the contract construed it as prescribing computation of liquidated damages for delay in the following manner, and liquidated damages of $3,480 were accordingly withheld from the contract price in the last settlement:

Number of Buildings	Acceptance Date (1934)	Days of Delay	Rate Per Day	Damages
6	Nov. 13	1	$24	$ 24.00
6	Nov. 16	4	24	96.00
7	Nov. 24	12	28	336.00
6	Nov. 29	17	24	408.00
5	Dec. 7	25	20	500.00
5	Dec. 11	29	20	580.00
6	Dec. 13	31	24	744.00
6	Dec. 15	33	24	792.00
47				3,480.00

The buildings were accepted in lots as tendered by the plaintiff.

After the foundation piers were installed progress was normal, and the assessment and withholding of liquidated damages for delay was solely to cover alleged delay by the plaintiff in installing those piers, more particularly delay in the commencement of excavation for the piers.

The excavation was for cylindrical piers 18 inches in diameter, increased to 4 or 5 feet at the bottom in the shape of a bell, to increase the bearing area.

For structural considerations boring of the hole could not vary from the perpendicular and top and bottom had to center nicely. The bell shape at the bottom of the excavation was cut out with a reaming arrangement lowered into the hole in the final boring. It was possible to excavate the bell shape by hand, but this method, due largely to the confined space, was awkward and inefficient and not ordinarily resorted to.

Excavations of this form were peculiar to areas having the foundation difficulties here present, and the work was a specialty. There were few concerns or individuals equipped and capable of making the necessary excavations.

On November 2, 1933, the plaintiff entered into a written agreement with The Excavating & Foundation Company, a Missouri corporation, hereinafter referred to as the Excavating Company, whereby that company undertook, among other things, to excavate for the pier foundations of the 59 buildings.

53 The specifications required the approval of all subcontractors by the constructing quartermaster. The

constructing quartermaster promptly approved the Excavating Company as such subcontractor.

At this time the Excavating Company was doing identical work on a nearby project (herein referred to as the "S. & W." contract) under the jurisdiction of the same constructing quartermaster. In beginning the "S. & W." contract work the Excavating Company had run into two or three weeks' difficulties due to its own inexperience and lack of appropriate equipment. At the request of the contractor the Excavating Company called in to its assistance one A. H. Beck, of San Antonio, Texas, an individual trading as A. H. Beck Foundation Company, hereinafter referred to as the Beck Company, who was experienced and well equipped, and to whom the Excavating Company sublet half of the "S. & W." contract work. By that time the Excavating Company had perfected its equipment, was operating efficiently, and was prepared to do plaintiff's work.

In order to begin work on the Holpuch contract promptly the Excavating Company had prepared an extra rig, similar to the two it was using on the "S. & W." contract. In excavating, the physical work was done by common labor.

Work on the superstructures was wholly dependent upon the foundations, and plaintiff urged the Excavating Company to get started on the agreed excavation. The constructing quartermaster would not permit the Excavating Company to proceed with the Holpuch contract until the work it was doing on the "S. & W." contract was completed, nor would he permit the extra rig, so constructed by the Excavating Company, to be used on the Holpuch project.

The constructing quartermaster insisted that the Beck Company be given the work on the Holpuch job, and, in order to extricate itself from these difficulties, the Excavating Company sublet its entire work on the Holpuch job to the Beck Company, and the Beck Company in course of time performed it.

The delay for which liquidated damages were assessed and withheld was due solely to the constructing quartermaster's refusal to permit the Excavating Company to proceed with plaintiff's work when the plaintiff called

upon it to do so.

54 This action on the part of defendant's constructing quartermaster, interfered with plaintiff's prosecution of its work, and prevented the plaintiff from completing the work by the agreed date.

The plaintiff did not notify the contracting officer of the cause of the delay, in the time, manner and form required by Article 9 of the contract.

8. The plaintiff appended to its last voucher for payment under the contract a list of claims, included in which were the items here in suit, covered by a note as follows:

> The acceptance of payment on this voucher is without prejudice to the right of the Contractor to submit its claims to the General Accounting Office as itemized on the attached paper.

There is no proof of submission of these claims to the General Accounting Office.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is entitled to recover $8,221.87.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of eight thousand two hundred twenty-one dollars and eighty-seven cents ($8,221.87).

Opinion

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case and that of the same plaintiff, docket No. 43809, were heard, argued and submitted together. They involve the same project, the erection of company officers' quarters at Fort Sam Houston, Texas, and where the buildings under one contract left off, the others began. The facts closely parallel each other.

What is said in the other case with respect to spiral spacers, applies here. For lack of the proof referred to, there can be no recovery.

With regard to bricklayers' increase in wages, the plaintiff is, for the reasons stated, entitled to recover $3,299.00 without profit or overhead.

55 The increase in lumber prices here was also an expense for which defendant is not liable. Notice of the increase under the Code was published before the plaintiff entered into the instant contract, very shortly before, it is true, but still before, and plaintiff had no firm and binding agreement with the lumber company as to prices.

As to footing depths, the figures are different, but the variance is not so great, or so persuasive, as to make the selection different. The 33-foot basis is the appropriate one to apply, and the plaintiff on that basis is entitled to recover $4,922.87. The contract was not altogether well-drawn and another instance perhaps of inartificiality is that the unit price for excavation in piers and bell foundations, for additions to and deductions from the contract prices, is given in case No. 43809 as $60 per cubic yard, while in the case we have here, No. 43812, it is given as $1.50 per cubic yard, one being forty times that of the other. The suspicion can hardly be avoided that the contract was not free from mistakes.

The plaintiff's claim for remission of liquidated damages for delay must fail in this case as in the other, because the claim was not perfected in the manner agreed to. The paying officer was here also to be the Finance Officer, U. S. Army, Fort Sam Houston, Texas. He may or may not have been advised by the contracting officer as to deduction for liquidated damages, but the plaintiff here did not forestall the deduction by pursuing the contract formality of the ten-day notice under Article 9, which would have started in motion an administrative examination of the claim. Such an examination is here lacking and the plaintiff may not recover.

Plaintiff is entitled to recover $8,221.87. It is ordered.

MADDEN, *Judge*; and LITTLETON, *Judge*, concur.

JONES, *Judge*; and WHITAKER, *Judge*, took no part in the decision of this case.

57 *Note re Exhibits*

The contract, specifications, schedules and drawings made a part of these findings by reference accompany this record under separate cover. (See Stipulation.)

59 *Judgment of the Court—May 7, 1945*

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes, as a matter of law, that the plaintiff is entitled to recover $8,221.87.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of eight thousand two hundred twenty-one dollars and eighty-seven cents ($8,221.87).

61 *Proceedings after entry of judgment*

On July 6, 1945, the defendant filed a motion for new trial.

On October 1, 1945, the court filed the following order on defendant's motion for new trial:

ORDER

It is ordered this 1st day of October 1945, that defendant's motion for new trial be and the same is overruled.

62 [Clerk's certificate to foregoing transcript omitted in printing.]

64 In the Supreme Court of the United States

Stipulation Not to Print Exhibits

It is hereby stipulated by and between counsel for the parties in the above-entitled cause that the exhibits filed by the parties in said cause in the Court of Claims which are part of the record of said cause in said court and which by reference are made a part of the Special Findings of Fact of said court need not be printed as part of the record of the above-entitled cause in this Court, but shall never-

theless be considered as part of the record and may be referred to by the Court and by counsel in the briefs and on oral argument.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General.

Norman B. Frost,
Norman B. Frost,
Counsel for respondent.

U. S. Government Printing Office: 1945 7-672121

Supreme Court of the United States

Oct. Term, 19[illegible]

Filed March 4, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

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CITATIONS

Cases:

Beuttas v. *United States*, 101 C. Cls. 748, reversed, 324 U. S. 768 — 9, 13, 17

Blair v. *United States*, 99 C. Cls. 71, reversed, 321 U. S. 730 — 9, 14, 17, 18

Callahan Walker Co. v. *United States*, 95 C. Cls. 314, reversed, 317 U. S. 56 — 9, 14, 17

Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387 — 13

McShain v. *United States*, 88 C. Cls. 284, reversed *per curiam*, 308 U. S. 512 — 9, 13, 17

Minnesota v. *United States*, 305 U. S. 382 — 12

Plumley v. *United States* 226 U. S. 545 — 13, 16, 17

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In the Supreme Court of the United States

OCTOBER TERM, 1945

NOS. 696 AND 697

THE UNITED STATES, PETITIONER

v.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION

THE UNITED STATES, PETITIONER

v.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the Court of Claims of the United States entered in the above-entitled cases on May 7, 1945.

OPINIONS BELOW

The opinions of the Court of Claims (No. 696, R. 43; No. 697, R. 44) are not yet officially reported.[1]

[1] Both cases were heard, argued and submitted together in the court below (No. 697, R. 44). Unless otherwise specified, numerical references to the findings of fact of the court below designate the findings in both cases.

JURISDICTION

The judgments of the Court of Claims were entered on May 7, 1945 (No. 696, R. 49; No. 697, R. 46). Motions for new trials were overruled on October 1, 1945 (No. 696, R. 50; No. 697, R. 47). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

1. Whether, under standard form government contracts, the Court of Claims can substitute its judgment as to the interpretation of plans and specifications for that of the constructing quartermaster, where the specifications designated the latter as the "interpreter" of plans and specifications, and where the contractor did not appeal from the constructing quartermaster's ruling, as required by Article 15 of the contract.

2. Whether a contractor may recover wages paid to certain of its employees over and above the minimum wage rates specified in the contracts, where (1) the increased minimum wage rates were not established by the Federal Emergency Administration of Public Works, and (2) the contractor failed to take an administrative appeal from an oral direction of the constructing quartermaster directing that the increased wages be paid.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contracts and specifications involved are set forth in Appendix A, *infra*, pp. 20–24.

STATEMENT

The following facts, as found by the court below unless otherwise specified, are common to both cases and may be summarized as follows:

Respondent, who is engaged in the building construction business in Chicago, on November 2 and 29, 1933, entered into two contracts with the United States through the War Department to construct officers' quarters at Fort Sam Houston, Texas, as part of a Federal Emergency Administration of Public Works project (Fdgs. 1 and 2). The work was to be completed in September and October, 1934, but because of delay, not here in issue, the work was not accepted as complete until November and December 1934 (Fdgs. 2 and 7). On January 12, 1938, the respondent brought two suits in the Court of Claims to recover, *inter alia*, (1) payments for excavations of footings to depths shown in the drawings, and (2) increased wages paid to its bricklayers (No. 696, R. 1; No. 697, R. 4–5, 7–8). Judgments were entered for the respondent on both claims.[2]

1. *Footing Depths* (*Fdg. 6*).—Article 3 of the specifications directed that the contractor excavate for footings "down to the depth and levels shown on the drawings," but that if "suitable bear-

[2] Respondent also sought to recover compensation for extra work performed, increased costs for lumber purchased, and liquidated damages assessed against the respondent. These claims were all rejected by the court below (No. 696, R. 43, 45–46, 48–49; No. 697, R. 44, 45).

ings [should] not be encountered at the levels shown on drawings, they shall be carried on to such levels as may be necessary and approved" by the constructing quartermaster. It also provided:

> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.

Article 4 of the specifications provided:

> For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in the bid will govern for any additions or deductions.

The court found "that the depth of footings was shown on the drawings as 33 feet from the finished floor of the building, and that it was on this basis that [respondent] estimated its bid" (No. 696, R. 37).

Respondent excavated to the depths approved by the Government's inspectors, and in making payment under the contracts, the differences between actual excavation depths and 37 feet 6 inches, at the unit prices named in the contracts, were withheld from the contract price. This deduction was calculated by the construction quartermaster and applied by the finance officer. The court held that the determination of the correct footing depths to be applied "was not a controversy over what work the contract and its specifications required," but that it is "a question of how the

contract price is to be computed," and that in view of the fact that the contracts stated on their "face that [they are] 'To be paid by the Finance Officer, United States Army, Fort Sam Houston, Texas'," the "responsibility for making correct payment was on the finance officer" (No. 696, R. 47). For this reason, the court stated that the "decision of the contracting officer as to the amount thereof would have been advisory, at the most, and that there was no appealable decision confronting" the contractor (*ibid.*). The court held that the "inconsistency" between the drawings and specifications was "impossible to reconcile," that the "33-foot base is the more logical of the two" (*ibid.*), and accordingly entered judgments against the United States in the amounts of $5,793.19 (No. 696, R. 48) and $4,922.87 (No. 697, R. 48).

2. *Bricklayers' Wages* (*Fdg. 4*).—Article 18 (a) of the two contracts here involved provided that the contractor should not pay skilled labor less than $1.00 per hour.[3] Article 18 also provided:

> (c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates

[3] In No. 697, Article 18 (a) originally provided a minimum of $1.10 per hour for skilled labor, but this was subsequently modified by the parties to $1.00 per hour (R. 34–35).

specified above, such agreed wage rates shall apply * * *.

* * * * *

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In the event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

On March 3, 1934, the Board of Labor Review in connection with another project for Army construction at San Antonio, Texas, to which the respondent was not a party, ruled that bricklayers employed thereon should be paid at the rate of $1.25 per hour retroactive to February 2, 1934. This decision was transmitted to the respondent by the constructing quartermaster on March 20, 1934, who, on March 23, 1934, advised the respondent that all bricklayers employed on the

project "will be paid at the rate of $1.25 per hour." On March 29, 1934, the respondent stated under protest that it would be governed accordingly, and that it expected reimbursement of the difference of 25 cents per hour.

On May 12, 1934, the constructing quartermaster advised respondent that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity should be paid $1.25 per hour, retroactive to February 2, 1934, and that the contractor would be within its "rights to file appeal with the Board of Labor Review from the decision of the contracting officer." Respondent took no such appeal and paid its bricklayers $1.25 per hour. Stating that the "ordered increase of 25 cents an hour in wages increased the contract price under the terms of Article 18 (e)" and that "it was plainly of no special interest to [the contractor] to [appeal to the Board of Labor Review], for the contract provided an automatic increase in contract price to cover such an increase in wages" (No. 696, R. 45), the Court of Claims entered

[4] Chief Justice Whaley delivered the "opinion of the court" in both cases, in which Judges Madden and Littleton concurred; Judges Jones and Whitaker took no part in the decision of either case. (No. 696, R. 43, 49; No. 697, R. 44–45.) Although the court below wrote two opinions in these cases, the reasons underlying the decisions are found in the opinion in No. 696. These reasons are adopted in the court's opinion in No. 697.

judgments against the United States for $821.63 and $3,299.00 on these claims (No. 696, R. 45; No. 697, R. 45).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that the dispute as to footing depths was not one which the parties had agreed to submit to the constructing quartermaster and the contracting officer for final determination;

(2) In holding that it had authority to reconcile the dispute as to footing depths and to substitute its judgment for that of the constructing quartermaster;

(3) In holding that the finance officer's duty to make payments under the contracts deprived the constructing quartermaster and the contracting officer of the authority to make a binding ruling as to footing depths.

(4) In holding that 33 feet was the proper footing depth to be applied.

(5) In holding that the minimum wage rates were increased under Article 18 (e) of the contracts.

(6) In failing to hold that the increased minimum wage rates were paid by the respondent pursuant to directions under Article 18 (c) of the contracts, for which the United States assumed no liability.

(7) In failing to hold that there was a dispute as to whether increases in minimum wage rates

were ordered under Article 18 (c) of the contracts which the parties had agreed to submit to the contracting officer under Article 15.

(8) In entering judgments for the respondent.

REASONS FOR GRANTING THE WRITS

1. Article 15 of the standard form government contract[5] provides that "all disputes" except labor disputes, "concerning questions arising under this contract shall be decided by the contracting officer * * * subject to written appeal by the contractor * * * to the head of the department * * * whose decision shall be final and conclusive." This Court has repeatedly recognized that Article 15 constitutes "the only avenue for relief" available for the settlement of disputes concerning questions arising thereunder, and that unless resort to that provision is made by the contractor, no claim for damages may be asserted in the Court of Claims. *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61; *United States* v. *Blair*, 321 U. S. 730, 735; *United States* v. *McShain*, 308 U. S. 512, 520–521. The court below has failed here to follow those decisions, and has substituted its own judgment for that which the contracts en-

[5] The form of government contract here involved is "U. S. Government Form P. W. A. 51" (No. 696, R. 12; No. 697, R. 12), and is identical with those considered by this Court in *United States* v. *McShain*, 308 U. S. 512; *United States* v. *Blair*, 321 U. S. 730; and *United States* v. *Bentas*, 324 U. S. 768.

trusted exclusively to the administrative officers. It held that the interpretation of the drawings and specifications, insofar as the determination of footing depths for compensation purposes was concerned, was to be made by the finance officer and not by the officers named in the contracts and specifications to interpret the specifications and settle disputes. From this it concluded that it could substitute its decision for that of the finance officer, inasmuch as the contracts did not make his decision final. We submit that in so holding the court below has decided an important question of government contract law in a manner which conflicts with the obvious intent of the contracts and the controlling decisions of this Court.

The court below found (Fdg. 6) that while Article 4 of the specifications stated that for "estimating purposes the depth of foundations will be estimated at 37 feet 6 inches," and that the constructing quartermaster calculated the deductions to be made from the contract price on the 37 feet 6-inch base, such depths were "shown on the drawings as 33 feet * * * and it was on this depth that [the contractor] estimated its bid." Despite the fact that Article 2 of the contracts and Article G. C. 21 of the specifications provided that in "case of difference between drawings and specifications, the specifications shall govern," the court below held that there was "an inconsistency" between the drawings and speci-

fications which was "impossible to reconcile," and resolved the issue by applying the 33-foot depth as the base for computing the amounts due the respondent under the two contracts because "Logic and reason tip the balance in favor of the 33-foot pay basis" (No. 696, R. 48).[6] The court below reached this conclusion on the ground that this "was not a controversy over what work the contract and its specifications required" but a "question of how the contract price is to be computed," and that the "decision of the contracting officer as to the amount thereof would have been ad-

[6] The "logic and reason" which persuaded the court below to adopt the 33-foot basis was stated to be the fact that "the 33 feet were shown on the drawings and that turned out to be approximately the average," that such a base "permits additions as well as deductions," and that "by using the 37-foot-6-inch pay basis there resulted no additions whatever to the contract price, only deductions, a one-sided proposition, somewhat to [the respondent's] discomfiture" (No. 696, R. 48). The findings of the court, however, render the court's reasoning somewhat questionable. The court found (Fdg. 6) that the soil "beneath the projected houses was, when wet, shifting and unstable," and it seems obvious that additions and deductions to the contract price for footing depths were stipulated in the contract because actual footing depths were unforseeable. The court also found that in No. 627 the actual footing depths actually ranged up to 42.42 feet. In light of the fact that the soil was unstable and that footing depths did actually range up to some 42 feet, the respondent's "discomfiture" which resulted because the actual footing depths averaged 32.49 and 34.43 feet (Fdg. 6), thus permitting only deductions from the contract price, can hardly be said to be a "one-sided proposition" warranting the adoption of the 33-foot basis as the more "logical" of the two bases.

visory, at the most" (No. 696, R. 47), because the "face of" the contract provided that it is "To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, Texas," and that accordingly "the responsibility for making correct payment was on the Finance Officer" (*ibid.*).

It is to be observed that the finance officer is not mentioned in the body of the contracts, and the notation on their face is "merely an indication to the constructing quartermaster to which disbursing officer the constructing quartermaster should certify vouchers" for payment. See Statement of Administrative Practice, Appendix B, *infra*, pp. 25–28. The administrative practice has consistently been that the "designation of the Finance Officer is not a term of the contract", that he is not authorized to alter or modify the decisions of a constructing quartermaster, the contracting officer, or the head of the department, and that he may not undertake to determine questions arising under the contracts which are entrusted to the former. *Ibid.*[1]

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[1] The Statement of Administrative Practice which has been reproduced was submitted to the court below with the motion for a new trial. Cf. *Minnesota* v. *United States*, 305 U. S. 382, 390. As it discloses, there is usually a finance officer who acts as disbursing officer in every War Department construction contract. If a finance officer were responsible for the correctness of the decision of the contracting officer upon all questions affecting the amount of payment, it would be difficult to conceive of what questions would be left open to the contracting officer for decision. If, for example, a contracting officer decided that a contractor had excavated

The principal error of the court below, however, is that it failed to follow or apply the controlling provisions of the contract. Aside from the fact that it ignored Article 2 of the contract and G. C. 21 of the specification which provide that in the event of conflict between the specifications and drawings, the specifications shall control, the "inconsistency," if any, between the plans and specifications was a dispute precisely within the terms of Article G. C. 10 of the specifications which designated the constructing quartermaster as the "interpreter" of the "true intent and meaning of the drawings and specifications." This Court has repeatedly held (*Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *United States* v. *McShain*, 308 U. S. 512, 520–521, reversing *per curiam*, 88 C. Cls. 284) that ambiguities in plans and specifications pose questions under government contracts susceptible of final and conclusive determination by the government officers designated in the contracts.[8] The court below also

2,000 cubic yards, the contracting officer's decision as to such a question of fact would not be final under the decision of the court below because of the disbursing officer's responsibility for payment.

[8] Cf. *Bouttas* v. *United States*, 101 C. Cls. 748, reversed in 324 U. S. 768, where the court below stated (101 C. Cls. 768): "It is true that it is not uncommon in construction contracts for the parties to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications * * * and similar matters of fact."

ignored the broader provisions of Article 15 which directs that all "disputes [except labor issues] concerning questions arising under the contract shall be decided by the contracting officer" subject to written appeal to the head of the department (*infra*, p. 20). In light of these provisions, the resolution of the "inconsistency" by the court below was unwarranted, and respondent's failure to appeal to the contracting officer under Article 15, from the ruling of the constructing quartermaster should have barred its recovery. *United States* v. *Callahan Walker Co., supra*, at 61; *United States* v. *Blair, supra*, at 735.

2. The court below also erred in entering judgment for the additional wages paid to bricklayers. It found (Fdg. 4) that during the performance of respondent's contracts the Board of Labor Review, in connection with another project for Army construction at San Antonio, Texas, to which the respondent was not a party, ruled that bricklayers employed thereon should be paid at the rate of $1.25 per hour; that on March 23, 1934, the effect of this decision was conveyed to the respondent by the constructing quartermaster who advised respondent that all bricklayers employed on the projects here involved "will be paid at the rate of $1.25 per hour;" that the contractor paid this rate "under protest," expecting reimbursement of the difference of 25 cents per hour; that the constructing quartermaster advised the

respondent on May 12, 1934, that it was the decision of the contracting officer that bricklayers employed on War Department construction projects in San Antonio and vicinity should be paid $1.25 per hour; and that no steps were taken by the respondent under the contracts to avert its liability for the increased wages paid to the bricklayers. The court below allowed recovery on this item, ruling that the increase in bricklayers' wages was "ordered" under Article 18 (c) of the contracts which, the court stated, "provided an automatic increase in contract price to cover such an increase in wages" (No. 696, R. 45).

Article 18 (c) provided that the minimum rates specified in 18 (a) were "subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review," in which event the contract price was to be adjusted accordingly. Article 18 (c) provided that "in the event that the prevailing hourly rates prescribed under collective bargaining agreements or understandings between organized labor and employees * * * shall be above the minimum rates specified * * *, such agreed rates shall apply." There is no finding that the Federal Administration of Public Works ordered respondent to pay its bricklayers more than the minimum wage rates specified in Article 18 (a) of the contracts as supplemented by Article 18 (c). Accordingly, the "advice" of

the constructing quartermaster that the bricklayers on respondent's projects "will be paid at the rate of $1.25 per hour" and the "decision" of the contracting officer to the same effect (Fdg. 6), were not orders increasing wage rates under Article 18 (e) of the contracts, but evidently directions under Article 18 (c) to pay the minimum wage rates provided by existing agreements. At the very least, any question whether the direction was one under Article 18 (c) or under Article 18 (e) was an appropriate matter for resolution under Article 15 of the contracts, which respondent did not invoke.

Even under the view of the court below, if the action of the constructing quartermaster and the contracting officer be regarded as an order to the respondent to increase the minimum wage rates under Article 18 (e) of the contracts, the respondent's resulting cost increases would be a consequence of oral advice of subordinate Government officials not "in the manner required by the contract." *Plumley v. United States*, 226 U. S. 545, 547. If the respondent had deemed such action improper, as apparently it did since the increased wages were paid "under protest" (Fdg. 4), its remedy was under Article 15 of the contracts,[9] a

[9] Nothing in the contracts involved in this case specifically excepts the instant dispute from Article 15. "Labor issues" arising under the contracts, which Article 15 requires to be submitted to the Board of Labor Review if they "cannot be satisfactorily adjusted by the contracting officer," clearly embrace only issues between employers and employees.

provision which this Court has recognized affords "the Government * * * an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions," the respondent is "not free to disregard them." *United States* v. *Blair*, 321 U. S. 730, 735; *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61. Thus, respondent's election to proceed without obtaining orders in the manner provided by the contracts, and its failure to invoke Article 15, should have barred its recovery in the court below. *United States* v. *Blair*, *United States* v. *Callahan Walker*, *United States* v. *McShain*, *Plumley* v. *United States*, all *supra*.

3. The Government is aware that, ordinarily, erroneous decisions do not warrant writs of certiorari. The instant decisions, however, are the latest of a series in which the Court of Claims has refused to recognize the authority of designated officers of the United States to settle administratively, without litigation, disputes arising under its construction contracts. See *McShain* v. *United States*, 88 C. Cls. 284, reversed *per curiam*, 308 U. S. 512, 520–521; *Callahan Walker Co.* v. *United States*, 95 C. Cls. 314, reversed, 317 U. S. 56; *Blair* v. *United States*, 99 C. Cls. 71, reversed, 321 U. S. 730; *Beattas* v. *United States*, 101 C. Cls. 748, reversed, 324 U. S. 768. In the instant cases, where Article 15 of the contracts plainly intended that the contracting officer decide all "questions aris-

ing" thereunder, the court below refused to accord that provision any meaning with respect to questions as to (1) the interpretation of plans and specifications, and (2) whether wage increases were ordered under the contracts. The decision thus operates to deprive the Government "of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims" (*United States* v. *Blair*, *supra*, p. 735) in an important class of cases.

Moreover, that portion of the decisions of the court below which holds that the responsibility for payment resting in a finance or disbursing officer deprives a contracting officer of power to adjudicate disputes under a standard form government contract throws serious doubt and confusion upon the authority of contracting officers under these contracts. In light of the fact that nearly every War Department construction contract indicates on its cover that payments are to be made by the finance officer of a particular district (Appendix B, *infra*, p. 25), a decision of this Court on this issue is of great importance to the Government. If such a notation can nullify Article 15 of a standard form construction contract, the effective submission of disputes to administrative decision will frequently be frustrated. We submit that the power of the Government to make effective contracts of this character should not be so circumscribed and that the decisions below should be reviewed.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

DECEMBER 1945.

APPENDIX A

CONTRACT PROVISIONS

Articles 2, 15, and 18 of the contract provided:

ART. 2. *Specifications and drawings.*—* * * In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. * * *

* * * * *

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

* * * * *

ART. 18. *Wages*—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.00[1]
Unskilled labor	.40

* * * * *

(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

* * * * *

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the op-

[1] In No. 697, the minimum wage for skilled labor was originally $1.10, but was thereafter modified by the parties to $1.00 (R. 35).

eration of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

SPECIFICATIONS

Articles 3 and 4, and paragraph 45 of the specifications provided:

3. *Excavation.*—Do all excavating of every description and of whatever substances encountered to the dimensions and levels shown. All excavated material, including top soil, shall be deposited around the buildings, where and as directed by the C. Q. M. Top soil shall be stacked separately.

Excavation for footings shall be carried down to the depth and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.

Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.

Care shall be taken not to excavate beyond the depths shown on drawings, as no backfilling under footings will be permitted, and any excess below the levels shown shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact undisturbed bottoms.

All excavations shall be maintained in good order during the progress of the work,

and, if necessary, sheet piling shall be used and maintained in position until removal is authorized by the C. Q. M.

4. Excavation for pier foundations will be made with a suitable boring machine acceptable to the C. Q. M. Such excavation will extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended. If wet or unstable materials are encountered in the process of boring holes, the excavation must be cased with metal casings of ample strength to prevent crushing. Casings may be collapsible or of one length.

Ground water encountered must be kept from the excavation at all times. In no case will water be permitted to reach footing bottoms.

At the contractor's option, reaming of conical shaped bottoms may be performed either by hand or mechanical methods. For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

* * * * *

45. *Footings, etc.*—The Contractor shall see that the bottom of all excavations are of undisturbed soil, properly leveled before pouring footings.

Extension of foundations beyond dimensions given on the drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of the bid. If solid foundation is found at a lesser depth than the dimension given on the drawings, then a credit will be given the U. S., based on the "Unit Prices."

Article G. C. 10 of the specifications provided:

> *Interpretation of Contracts.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. [meaning the defendant's constructing quartermaster] shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

Article G. C. 21 of the specifications provided:

> *Discrepancies.*—* * *. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the C. Q. M., without whose decision said discrepancy shall not be adjusted by the Contractor, save only at his own risk * * *. In case of difference between drawings and specifications, the specifications shall govern.

APPENDIX B

ADMINISTRATIVE PRACTICE

(See supra, p. 12, n. 7)

STATE OF VIRGINIA,
County of Arlington, ss:

Adel C. Harden being duly sworn deposes and says:

"I am a Colonel in the Finance Department, United States Army, and am presently assigned as Chief, Receipts and Disbursements Division, Office of the Fiscal Director, Army Service Forces. I have had over twenty-five years experience in fiscal matters and I have years of experience handling disbursing accounts. I have effected payment on many construction contracts.

The practice is to have all contracts made with the Army paid by a disbursing officer after certification by a certifying officer, who may or may not be the same person as the disbursing officer. Usually upon cover pages of all construction contracts, the disbursing officer is designated as the Finance Officer of a particular district. Such a notation appeared on the cover of the contracts involved in the cases of *Joseph A. Holpuch* v. *The United States*, Court of Claims Nos. 43809 and 43812, as follows:

To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, Texas.

This is merely an indication to the constructing quartermaster to which disbursing officer the constructing quartermaster should certify vouchers.

The designation of the Finance Officer is not a term of the contract. It is part of an outline showing the parties, the amount, the site of the work, the services to be performed, and the authorized accounts to which payments will be charged. The contract preamble and all of the contract terms follow the designation of the disbursing officer, which office might on Army orders be changed at any time. In making such a change the War Department would definitely not seek the consent of the contractor.

The contracts themselves provided:

> ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.
>
> ART. 16. *Payments to contractors.*—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the

contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration. * * *

Article G. C. 10 of the specifications provided:

> *Interpretation of contract.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. (meaning the defendant's constructing quartermaster) shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

On a construction contract containing the above terms the disbursing officer would not in practice alter or modify and would not be authorized to alter or modify the decision of a certifying construction quartermaster as to the basis on which payments can be made under the contract when such basis, as here, is dependent upon an interpretation of the specifications or has been covered by a decision on a dispute by the contracting officer. If the disbursing officer desired to question the propriety of making payment based on such an interpretation or decision he could submit the matter to the Comptroller General as a request for advance decision (31 U. S. C. 74) or he could transmit the matter to the General Accounting Office for settlement (31 U. S. C. 71).

I understand that payment for excavation of foundations was made in a monthly progress payment certified to by the constructing quarter-

master; that in certifying the voucher for such payment the constructing quartermaster determined that the correct base for figuring additions or deductions to the contract at unit prices was 37 feet 6 inches rather than 33 feet. Such a decision in our practice would not be made by a disbursing officer, because we would consider it to have been made under paragraph GC–10 of the specifications. Therefore, the Finance Officer would have no duty or authority to overrule it. Only if it were apparent that fraud was being practiced might the disbursing officer question any such payment. I also understand that the contractor protested the use of the 37 foot 6 inch base, whereupon the constructing quartermaster decided the dispute by overruling the contractor's protest and thereafter the contractor took no appeal either to the contracting officer or to the head of the Department. Our practice would be that where the constructing quartermaster as representative of the contracting officer decides such a dispute pursuant to Article 15 of the contract, the disbursing officer has no power to challenge such a ruling.

Another reason why the Finance Officer would not undertake to determine the question presented in this case is that finance officers as a rule have no experience with construction and would not be qualified to make such decisions.

(Signed) A. C. HARDEN,
Colonel, FD.

Sworn to before me this 27th day of June 1945.

J. LINDEN WILL,
Notary Public, Arlington County, Virginia.
My commission expires December 11, 1946.

U. S. GOVERNMENT PRINTING OFFICE 1946

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 696

THE UNITED STATES, PETITIONER

v.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION

No. 697

THE UNITED STATES, PETITIONER

v.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (No. 696, R. 43–49; No. 697, R. 44–45) are not yet officially reported.[1]

JURISDICTION

The judgments of the Court of Claims were entered on May 7, 1945 (No. 696, R. 49; No. 697,

[1] These cases, Nos. 696 and 697, were heard, argued, and submitted together in the court below (No. 697, R. 44).

R. 46). Motions for new trials were overruled on October 1, 1945 (No. 696, R. 50; No. 697, R. 46). The petition for writs of certiorari was filed on December 27, 1945, and was granted on March 4, 1946 (No. 696, R. 51; No. 697, R. 48). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether, under standard form government contracts, the Court of Claims can substitute its judgment as to the interpretation of plans and specifications for that of the constructing quartermaster, where the specifications designated the latter as the "interpreter" of plans and specifications, and where the contractor did not appeal from the constructing quartermaster's ruling, as required by Article 15 of the contract.

2. Whether a contractor may recover the amount of an increase in wages paid to certain of its employees "under protest" where (a) the contractor failed to take an administrative appeal from the order of the constructing quartermaster to pay the increased wages, and where (b) the increased wages were not established by the only agency whose determination would effect an automatic increase in compensation.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contracts and specifications involved are set forth in Appendix A, *infra*, pp. 43–47.

STATEMENT

On November 2 and 29, 1933, respondent entered into two contracts with the United States, through the War Department, to construct officers' quarters at Fort Sam Houston, Texas, which were being built as a Federal Emergency Administration of Public Works project (No. 696, R. 29–30; No. 697, R. 30–31). The November 2 contract, that involved in No. 697, was for the construction of 59 officers' quarters (R. 30–31); the November 29 contract, that involved in No. 696, for the construction of 16 officers' quarters (R. 29). The two contracts involved "the same project * * * and where the buildings under one contract left off, the others began" (No. 697, R. 44). The work under the contracts was to be completed in September and October 1934 (No. 696, R. 30; No. 697, R. 31) but, because of delay not here in issue, the work was not accepted as complete until November and December 1934 (No. 696, R. 40; No. 697, R. 41).

On January 12, 1938, respondent brought these suits in the Court of Claims (No. 696, R. 1–11; No. 697, R. 1–12) to recover, *inter alia*, with respect to each contract, (1) certain payments for excavations for footings (No. 696, R. 7–8; No. 697, R. 7–8) and (2) increased wages paid to its bricklayers (No. 696, R. 4–5; No. 697, R. 4–5).[2]

[2] Respondent also sought to recover compensation for extra work performed, increased costs for lumber purchased, and liquidated damages assessed against it (No. 696, R. 3–10;

Judgments were entered for respondent on both claims (No. 696, R. 33–38, 43–49; No. 697, R. 34–39, 44–46).[3]

1. *Footing Depths.*—Paragraph 3 (No. 696, R. 36; No. 697, R. 37; *infra*, pp. 45–46)[4] of the specifications directed respondent to excavate for footings "down to the depth and levels shown on drawings" and provided that if "suitable bearings [should] not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M."[5] Paragraph 3 further provided that—

> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount

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No. 697, R. 3–10). These claims were rejected by the court below (No. 696, R. 31–33, 35–36, 38–43, 45–46, 48–49; No. 697, R. 32–34, 36–37, 39–45).

[3] In No. 696, judgment was entered for respondent in the amount of $6,614.82 (R. 43, 49) consisting of $821.63 allowed on the claim for increased wages paid to bricklayers (R. 34, 45) and $5,793.19 allowed on the claim with respect to footing excavations (R. 36, 38, 48). In No. 697, judgment was entered in the amount of $8,221.87 (R. 44–46) consisting of $3,299 allowed on the claim for increased wages paid to bricklayers (R. 36, 45) and $4,922.87 allowed on the claim with respect to footing excavations (R. 37, 39, 45).

[4] Since the two contracts, except for the number of officers' quarters being erected thereunder and amounts, are virtually identical, reference herein to portions of the contract or specifications are applicable to the contracts and specifications in both cases.

[5] The constructing quartermaster. Paragraph G. C. 2 of the specifications, *infra*, p. 45.

mentioned for excavating under "Unit Prices" of bid.

Paragraph 4 of the specifications (No. 696, R. 36–37; No. 697, R. 37–38, *infra*, pp. 46–47) provided that

> * * * excavation will extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended * * * For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

The court below found that "the depth of footings was shown on the drawings as 33 feet from the finished floor of the building, and it was on this depth that [respondent] estimated its bid" (No. 696, R. 37; No. 697, R. 38).

Respondent excavated to the depths approved by the Government's inspectors (No. 696, R. 37; No. 697, R. 39). These depths ranged, in No. 696, from 29 feet to 37.5 feet below first floor level and averaged 32.49 feet below that level (R. 37); and, in No. 697, from 27.58 feet to 42.42 feet below first floor level and averaged 34.43 feet below that level (R. 39). In making payment under the contracts, the Government made extra allowance to respondent for excavation in excess of 37 feet 6 inches and, where actual excavation was less than 37 feet 6 inches, withheld from the

contract price the appropriate amount under the unit prices established by the contracts (No. 696, R. 37–38; No. 697, R. 39). In No. 696, the adjustment resulted in a net deduction of $5,793.19 from the contract price (R. 38); in No. 697, a net deduction of $4,922.87 (R. 39) These deductions were calculated by the constructing quartermaster and applied by the paying officer (No. 696, R. 38; No. 697, R. 39).

The court below held that the question concerning the correct footing depths to be applied in determining the amount to be paid to respondent or the amount to be deducted from the contract price "was not a controversy over what work the contract and its specifications required" but rather "a question of how the contract price is to be computed" and that, in view of the fact that the contracts stated on their "face that [they are] 'To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, * * * * * * * the responsibility for making correct payment was on the Finance Officer, the paying officer" (No. 696, R. 47).[6] The court stated that for this reason "the decision of the contracting officer as to the amount thereof would have been advisory, at the most, and there was no appealable decision confronting" respondent (No. 696, R. 47). The court

[6] Although there is a separate opinion of the court below in each of these cases (No. 696, R. 43–49; No. 697, R. 44–45), the reasons underlying the decision in No. 696 were adopted by the court below in No. 697 without further elaboration.

below further held that "an inconsistency" between the drawings and the specifications as to the footing depths was "impossible to reconcile" and that "the 33-foot pay basis is the more logical of the two" (No. 696, R. 46–47).

2. *Bricklayers' Wages.*—Article 18 (a) of the contracts (No. 696, R. 23, 33; No. 697, R. 23, 34; *infra*, pp. 43–44) provided that respondent should pay wages of not less than $1.00 per hour for skilled labor.[7] Article 18 further provided (No. 696, R. 23–24, 33; No. 697, R. 24, 34–35; *infra*, p. 44):

> (c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply * * *.
>
> * * * * * *
>
> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the

[7] While in No. 697 Article 18 (a) originally provided a minimum of $1.10 per hour for skilled labor, this was subsequently modified by the parties to $1.00 per hour (R. 34–35).

project to the contractor, whether under this contract or any subcontract.

On March 3, 1934, the Board of Labor Review of the Federal Emergency Administration of Public Works ruled that bricklayers employed on another project for Army construction, at San Antonio, Texas,* to which respondent was not a party, should be paid at the rate of $1.25 per hour retroactive to February 2, 1934 (No. 696, R. 34; No. 697, R. 35). This decision was transmitted to respondent by the constructing quartermaster on March 20, 1934 (No. 696, R. 34; No. 697, R. 35). On March 23, 1934, the constructing quartermaster advised respondent that all bricklayers employed on the project here involved "will be paid at the rate of $1.25 per hour" (No. 696, R. 34; No. 697, R. 35). On March 29, 1934, respondent stated "that it would be governed accordingly but under protest, and [that it] expected reimbursement of the difference of 25 cents per hour" (No. 696, R. 34; No. 697, R. 35). On May 12, 1934, the constructing quartermaster "advised" respondent "that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity should be paid $1.25 per hour, retroactive to February 2, 1934," and that respondent "would be within its 'rights to file appeal with the Board of Labor Review

*"Fort Sam Houston and San Antonio are in the same vicinity" (No. 696, R. 45).

from the decision of the contracting officer'" (No. 696, R. 34; No. 697, R. 35). Respondent took no such appeal and paid its bricklayers $1.25 per hour (No. 696, R. 34–35; No. 697, R. 36).

The court below held that "the ordered increase of 25 cents an hour in the wages increased the contract price under the terms of Article 18 (e)" and that "it was plainly of no special interest to [respondent] to * * * appeal [to the Board of Labor Review], for the contract provided an automatic increase in contract price to cover such an increase in wages" (No. 696, R. 45).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that the dispute as to footing depths was not one which the parties had agreed to submit to the constructing quartermaster and the contracting officer for final determination.

(2) In holding that it had authority to reconcile the dispute as to footing depths and to substitute its judgment for that of the constructing quartermaster.

(3) In holding that the finance officer's duty to make payments under the contracts deprived the constructing quartermaster and the contracting officer of the authority to make a binding ruling as to footing depths.

(4) In holding that 33 feet was the proper footing depth to be applied.

(5) In holding that the minimum wage rates were increased under Article 18 (e) of the contracts.

(6) In failing to hold that the increased minimum wage rates were paid by the respondent pursuant to directions under Article 18 (c) of the contracts, for which the United States assumed no liability.

(7) In failing to hold that there was a dispute, as to whether increases in minimum wage rates were ordered under Article 18 (e) of the contracts, which the parties had agreed to submit to the contracting officer under Article 15.

(8) In entering judgments for the respondent.

SUMMARY OF ARGUMENT

The basic error of the court below lay in its failure to follow or apply the plain provisions of standard form Government contracts, particularly those relating to the administrative settlement of disputes arising under the contracts.

1. The contracts provided that "In case of difference between drawings and specifications, the specifications shall govern" (No. 696, R. 14; No. 697, R. 14; *infra*, pp. 43, 45) and that the constructing quartermaster "shall be the interpreter" of the "intent and meaning of the drawings and specifications" (No. 696, R. 30; No. 697, R. 31; *infra*, p. 45). The court below, however, refused to accord finality to the constructing quarter-

master's interpretation of the drawings and specifications with respect to the basis on which respondent would be paid for footing excavations, but gave judgment for respondent, despite the constructing quartermaster's adverse decision and despite respondent's failure to avail itself of the standard procedure provided in Article 15 of Government construction contracts for the settlement of disputes. In this, the decisions below run counter to the whole course of decision of this Court in Government contract litigation.

While these errors of the court below are, we believe, dispositive of these cases with respect to the footing-excavation claims, we submit that the constructing quartermaster's interpretation of the specifications and drawings was correct and that of the court below erroneous.

2. Respondent's failure to take the administrative appeal provided by the contracts is fatal also to its claim as to the increased wages paid by it to its bricklayers. The very ambiguity as to the basis for the increase underscores the need for such appeal to clarify the issue.

In any event, the interpretation by the court below of the wage provisions of the contracts was erroneous. Only if the increased wage rates paid by respondent were established by the Federal Emergency Administration of Public Works was respondent entitled to a contract price adjustment on their account. The increased rates paid by respondent were not so established.

Nevertheless, the court below in effect awarded respondent an adjustment in contract price measured by the amount of the increase.

ARGUMENT

The contracts here involved were both executed on U. S. Government Form No. P. W. A. 51 (No. 696, R. 12, 30; No. 697, R. 12, 31), "the critical provisions of which are substantially the same as those in the standard form of Government construction contract." *United States* v. *Blair*, 321 U. S. 730, 731. Those provisions are not novel to this Court. *Plumley* v. *United States*, 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *United States* v. *McShain*, 308 U. S. 512, 520–521; *United States* v. *Callahan Walker Co.*, 317 U. S. 56; *United States* v. *Blair*, 321 U. S. 730; *United States* v. *Beuttas*, 324 U. S. 768.

The prime error of the court below was its refusal, contrary to the decisions of this Court, to accord to those provisions the meaning and content which the parties to the contracts intended. The court's assumption of authority to interpret the contracts, specifications, and drawings with respect to matters left by the contracts and specifications to the exclusive determination of the Government's officers designated therein, its disregard of Article 15 of the contracts, which directs that all "disputes [except "labor issues"] concerning questions arising under this contract

shall be decided by the contracting officer * * * subject to written appeal * * * to the head of the department" (No. 696, R. 21; No. 697, R. 21–22; *infra*, p. 43), and its failure to follow or apply the controlling decisions of this Court, all lead to the conclusion that the decision below is erroneous.

I. THE UNITED STATES IS NOT LIABLE UNDER ITS CONTRACT FOR EXTRA PAY FOR THE FOOTING EXCAVATIONS

Paragraph 3 of the specifications (No. 696, R. 36; No. 697, R. 37; *infra*, pp. 45–46) required respondent to excavate "for footings * * * down to the depth and levels shown on drawings." Paragraph 4 of the specifications (No. 696, R. 37; No. 697, R. 38; *infra*, pp. 46–47) provided that "for estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level" and that "for any additions or deductions" "the unit prices quoted in bid will govern." Paragraph 45 of the specifications (No. 696, R. 37; No. 697, R. 38; *infra*, p. 47) provided for additional payment to respondent for the "Extension of foundations beyond dimensions given on the drawings" and for deduction from the contract price "If solid foundation is found at a lesser depth than the dimension given on the drawings."

The court below found that the "depth of footings was shown on the drawings as 33 feet from the finished floor of the building, and it was on this

depth that [respondent] estimated its bid." (No. 696, R. 37; No. 697, R. 38). The court below held that, with respect to the question as to the depth of the footing excavations which was to serve as the basis for respondent's receiving extra compensation or the Government's receiving a credit, there was "an inconsistency" which it was "impossible to reconcile" (No. 696, R. 46–47). With respect to this irreconcilable "inconsistency," however, Article 2 of the contract (No. 696, R. 14; No. 697, R. 14; *infra*, p. 43) provided:

> In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer.

The specifications, in paragraph G. C. 21 (*infra*, p. 45), made identical provision for the resolution of such discrepancies and provided further, in paragraph G. C. 10 (No. 696, R. 30; No. 697, R. 31; *infra*, p. 45), that "the C. Q. M.[9] shall be the interpreter" of the "intent and meaning of the drawings and specifications."

The constructing quartermaster resolved the discrepancy between the specifications and the drawings with respect to footing depths, in accordance with Article 2 of the contract and para-

[9]The constructing quartermaster. See note 5, *supra*. Paragraph G. C. 7 of the specifications provided that "the work is entirely under the control of the C. Q. M."

graph G. C. 21 of the specifications, and computed pay for the footing excavations on the basis of an estimating depth of 37 feet 6 inches as provided in paragraph 4 of the specifications. The court below, however, disregarded the plain terms of the contract, which not only designated the constructing quartermaster as the person to make such decisions, but also guided him by providing that "in case of difference between drawings and specifications, the specifications shall govern"; substituted its interpretation for that of the Government officers who the parties to the contract had agreed would settle such questions of interpretation; and held that pay for the footing excavations should have been computed on the basis of an estimating depth of 33 feet. In all these respects, as we shall show, the court below was in error.

A. RESPONDENT WAS BOUND BY ITS AGREEMENT THAT THE CONSTRUCTING QUARTERMASTER'S INTERPRETATION OF THE DRAWINGS AND SPECIFICATIONS WOULD BE FINAL AND CONCLUSIVE

The court below found that "an inconsistency" (No. 696, R. 46) existed between the specifications and the drawings with respect to the basis upon which pay for footing excavations was to be computed. Such "an inconsistency" necessitated the determination of the "true intent and meaning of the drawings and specifications." Paragraph G. C. 10; No. 696, R. 30; No. 697, R. 31; *infra*, p. 45. And the parties had agreed, in the very same

paragraph, that the constructing quartermaster would be the "interpreter" to resolve this and any other inconsistencies.

This Court has repeatedly held that ambiguities in plans and specifications under Government contracts pose questions susceptible of final and conclusive determination by the Government officer designated in the contracts. *Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *United States* v. *McShain*, 308 U. S. 512, 520–521. Indeed the court below, despite its failure to apply that principle in these cases, has itself recognized it, saying (*Beattys* v. *United States*, 101 C. Cls. 748, 768, reversed, 324 U. S. 768):

> It is true that it is not uncommon in construction contracts for the parties to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications * * * and similar matters of fact.

With the authority thus vested in him by the contract and specifications, the constructing quartermaster interpreted the specifications and drawings as meaning that the footing excavations were to be paid for on the basis of an estimated depth of 37 feet 6 inches. That determination was conclusive upon the parties to the contract and on the courts, and may not now be questioned, absent a showing of bad faith or error so gross as to

imply bad faith." *United States* v. *McShain*, 308 U. S. 512, 520–521; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, affirmed on rehearing, 261 U. S. 610; *Kihlberg* v. *United States*, 97 U. S. 398, 400; *Sweeney* v. *United States*, 109 U. S. 618; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185. There is no suggestion of bad faith in the findings or opinions below. Nor, despite the disagreement of the court below with the constructing quartermaster's determination as to footing depths, is there a

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" While the court below held that the question as to whether the "pay-basis" of the footing excavations should be 33 feet or 37 feet 6 inches "was not a controversy over what work the contract and its specifications required" but "a question of how the contract price is to be computed" (No. 696, R. 47), the provisions of the contract and the specifications, *infra*, pp. 43, 45, relating to the resolution of differences between drawings and specifications and the interpretation of the meaning of the drawings and specifications do not refer and are not limited to questions as to "what work the contract and its specifications required." They are of broad scope and govern as well the provisions in the specifications which bear upon the computation of payment as they do provisions regarding how the work is to be done and what standards of performance must be met. See the discussion *infra*, pp. 20–26, concerning the finality of decisions made by administrative officers under the contract with respect to matters bearing on "how the contract price is to be computed."

suggestion of gross error on his part (No. 696, R. 46–48)."

Respondent agreed to be bound by the constructing quartermaster's interpretation of the drawings and specifications; it was therefore bound by that officer's interpretation that the footing excavations were to be paid for on the basis of an estimated depth of 37 feet 6 inches.

B. SINCE RESPONDENT DID NOT COMPLY WITH THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES TO WHICH IT HAD AGREED, IT HAD NO STANDING TO SUE FOR BREACH OF CONTRACT BASED ON SUCH DISPUTES

The court below disregarded not only the plain provisions of the contracts which specifically provided for the administrative resolution of differences appearing between the drawings and specifications, but disregarded additionally the equally plain provisions of the contracts which established a procedure for the settlement of disputes arising thereunder.

Article 15 (No. 696, R. 21, 30; No. 697, R. 21–22, 31; *infra*, p. 43) of the contracts directed that all "disputes [except "labor issues"] concerning

[11] While it is our belief that the determination of the constructing quartermaster was clearly correct and the only one supportable under the terms of the contracts and specifications which required the specifications to govern in the event of differences between them and the drawings (*infra*, pp. 43, 45), the court below appears to have considered the question as to the "pay basis" for footing excavations to have been a close one and, after much discussion (No. 696, R. 46–48; No. 697, R. 45), found that "logic and reason tip [ped] the balance in favor of the 33-foot pay basis" (No. 696, R. 48).

questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal * * * to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions." It is now well settled that this provision in Government construction contracts provides "the only avenue for relief" available for the settlement of disputes arising thereunder (*United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61; *United States* v. *Blair*, 321 U. S. 730, 735) and that a contractor who, having accepted and agreed to Article 15, chooses not to follow its procedure to obtain relief, may not thereafter sue to recover damages in the Court of Claims.[12]

In this respect respondent's position differs not at all from that of the respondents in *United States* v. *Callahan Walker Co.*, 317 U. S. 56, and *United States* v. *Blair*, 321 U. S. 730, who were denied recovery by this Court, with respect to specified items, solely on the ground that they had failed to take the administrative appeal provided by Article 15. Indeed, so far as appears here

[12] Compare the analogous doctrine in the field of administrative law that a failure to exhaust administrative remedies precludes resort to the courts. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41; *Macauley* v. *Waterman Steamship Corporation*, No. 435, this Term, decided March 25, 1946; Berger, *Exhaustion of Administrative Remedies* (1939), 48 Yale L. J. 981.

(see No. 696, R. 38; No. 697, R. 39), respondent even failed, as did Mr. Blair (see 321 U. S. at 735), to take an appeal from the constructing quartermaster to the contracting officer. It is submitted that the same reasons which impelled this Court to reverse the Court of Claims in the *Callahan Walker* and *Blair* cases require reversal in the instant cases.

As in the *Blair* case, so here "the Court of Claims sought to justify respondent's failure to pursue the procedure outlined in Article 15." See 321 U. S. at 736. It sought to avoid the effect of the *Callahan Walker* and *Blair* decisions by holding that "no appealable decision" confronted respondent (No. 696, R. 47). Starting with the assumptions that the controversy was not "over what work the contract and its specifications required" but rather "a question of how the contract price is to be computed," and that "the responsibility for making correct payment was on the Finance Officer, the paying officer," the court below concluded that "the decision of the contracting officer as to the amount thereof would have been advisory, at the most, and there was no appealable decision confronting" respondent (No. 696, R. 47). To achieve this result, the court below seized upon the fortuity that, pursuant to the customary practice with respect to Army construction contracts (see Appendix B, *infra*,

p. 48), the cover pages of the contracts (No. 696, R. 12; No. 697, R. 12–13) indicated that payment was to be made "by the Finance Officer, U. S. Army, Fort Sam Houston, Texas." In 1933 and 1934, there were 18 Finance Officers, U. S. Army, located at various places in the United States.[14] All that the notation on the cover of the contract meant, and all it could possibly mean, was that payment would be made by the Finance Officer at Fort Sam Houston, Texas, and not by any other Finance Officer located elsewhere. See Appendix B, *infra*, p. 48. Indeed, as a matter of administrative practice, it has consistently been recognized that the "designation of the Finance Officer is not a term of the contract" and that he is not authorized to, and "would not in practice alter or modify" the decisions of a constructing quartermaster "as to the basis on which payments can be made under the contract when such basis, as here, is dependent upon an interpretation of the specifications or has been covered by a decision on a dispute by the contracting officer." Appendix B, *infra*, pp. 48, 50.[15]

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[13] The statement of administrative practice in this regard which appears as Appendix B, *infra*, pp. 48–51, was submitted to the court below with the motion for a new trial. Cf. *Minnesota* v. *United States*, 305 U. S. 382, 390.

[14] Army List and Directory, Jan. 1, 1933, p. 31; *ibid.*, July 20, 1933, p. 34; *ibid.*, Dec. 20, 1933, p. 19; *ibid.*, Apr. 20, 1934, p. 19; *ibid.*, Oct. 20, 1934, p. 19.

[15] "Finance officers as a rule have no experience with construction and would not be qualified to make such decisions." Appendix B, *infra*, p. 51.

The decision of the court below appears to be that, since the finance officer is concerned with making payment, any dispute relating to "how the contract price is to be computed" (No. 696, R. 47) is his to resolve; that, with respect to such matters, the decision of the contracting officer would be "advisory, at the most;" and that, since the contracts do not state that the finance officer's decisions shall be conclusive on the parties or that appeals lie from finance officer's decisions to some other Government officer,[16] the court was free to decide the dispute itself, substituting its judgment for that of the constructing quartermaster despite the fact that respondent took no appeal therefrom.

The fallacy of this syllogism is revealed, first, by the fact that the finance officer is nowhere mentioned in the contracts nor his duties thereunder referred to.[17] In addition, it is to be noted that Article 15 provides for the settlement of "all" disputes "concerning questions arising under this contract." Article 15 does not exclude from the authority of the contracting officer jurisdiction over and final decision (subject to appeal to the head of the department) of questions

[16] The contracts here in question could not very well have stated any such thing since they do not even mention the finance officer.

[17] A "Finance Officer, U. S. Army," is a regional disbursing officer for War Department activities. See par. 10, Army Regulations 35–5, dated June 6, 1930, and still in force.

affecting the amount of payment." And it cannot be denied that such questions are preeminently "questions arising under" the contract.

We believe it a truism that contractors do not engage in disputes with constructing quartermasters or other Government representatives as a matter of principle, but for money, and it would be a rare dispute, indeed, whose decision would not affect in some measure the amount of pay the contractor would get for the work performed. If the finance officer could review the decision of the contracting officer upon all questions relating to the computation of or affecting the amount of payment, as the decisions below indicate, it would be difficult to conceive of any questions that would be left open to the contracting officer for final decision subject to appeal to the head of the department. Decisions as to the most common type of disputes would be subject to the finance officer's review, despite the failure of the contract even to mention the finance officer at all.[17]

[16] Articles 3, 4, 5, and 9 of the contracts (No. 696, R. 14–15, 18–19; No. 697, R. 15–16, 19–20) also evidence the understanding of the parties that the contracting officer may make final decision of matters relating to amount of payment. The decisions below would nullify these provisions of the contract as well as Article 15.

[17] If, for example, a contractor, under contract to be paid per cubic yard excavated, claimed to have excavated 2,500 cubic yards and the contracting officer decided that he had excavated only 2,000, the contracting officer's decision of such a question of fact would be neither final nor appealable, under

In *Plumley* v. *United States*, 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *United States* v. *McShain*, 308 U. S. 512, 520–521; *United States* v. *Callahan Walker Co.*, 317 U. S. 56; and *United States* v. *Blair*, 321 U. S. 730, the controversies in which the decision of the contracting officer or head of the department was upheld by this Court all involved the amount of the contractor's compensation. Indeed, in the *McShain* case, the situation was virtually identical with the one involved here. There a dispute arose between the contractor's superintendent and the Government's construction officer at the site as to whether certain backfill was to be gravel or earth. See *McShain* v. *United States*, 88 C. Cls. 284, 288–289. The specifications provided for gravel backfill over certain subdrains, referring to the drawings for details; and that all other backfill should be earth. 88 C. Cls. at 288. The drawing referred to did not show gravel backfill over the subdrains in question. *Ibid.* In order to prevent the dispute's delaying the project, the Government's construction officer requested the contractor to proceed with the work, using gravel backfill, subject to a later cost adjustment. 88 C. Cls. at 289.

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the decisions below, because of the disbursing officer's responsibility for payment. Nor, under the decisions below, would such decision of the contracting officer be final if, in settling the dispute, he decided that the contractor *had* excavated 2,500 cubic yards. Cf. *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, affirmed on rehearing, 261 U. S. 610.

The McShain contract, as did those here involved, provided that "In case of difference between drawings and specifications, the specifications shall govern" and that the contracting officer or his representative was the interpreter of the drawings and specifications. See the Government's Brief in the *McShain* case, No. 43, Oct. Term, 1939, pp. 4–5, 19–20; Brief for McShain, p. 3. The McShain contract also contained the standard Article 15. *Ibid.* The contracting officer denied McShain's claim for the cost of installing the gravel backfilling. 88 C. Cls. at 289. On appeal to the head of the department, the claim was again rejected. *Ibid.* The Court of Claims allowed McShain recovery of that cost. 88 C. Cls. at 289, 295–297, 299. On certiorari, this Court reversed, *per curiam*, 303 U. S. 542, 520–521, on the authority of the holdings in *Plumley* v. *United States*, 226 U. S. 545, 547, and *Merrill Rockgable Co.* v. *United States*, 241 U. S. 387, 393, as to the finality of decisions of administrative officers to whom the parties to a contract entrust the settlement of disputes and of questions of interpretation of the specifications and drawings. The contracting officer's decision in the *McShain* case and that of the head of the department were not the less final merely because the controversy was as to whether the contractor was to receive extra compensation for gravel backfill and the administrative officers who decided the question were not the person who actually paid out the money.

The decision below, however, says, in effect, that while the Government and its contractors may contract to be bound by the interpretations and, in the event of disputes, by the decision of stated administrative officers, they will not be so bound if the interpretations or decisions involve the amount of money the contractor is to receive and the administrative officers mentioned in the contract are not those who actually pay out the money. Such a decision runs counter to the whole course of decision of this Court in Government contract litigation. Obviously, the mere indication on the covers of the contracts here involved that "the Finance Officer of a particular district" would serve as disbursing officer (*infra*, p. 48) did not derogate from the procedures established by the contracts with respect to the settlement of disputes arising thereunder.

C. IN ANY EVENT, THE CONSTRUCTING QUARTERMASTER'S INTERPRETATION OF THE SPECIFICATIONS AND DRAWINGS WAS CORRECT AND THAT OF THE COURT BELOW ERRONEOUS

While in our view the constructing quartermaster's interpretation of the specifications and drawings as to the "pay basis" for the footing excavations and respondent's failure to appeal therefrom are dispositive of the present cases, we believe that the decision below on the merits of the controversy is likewise erroneous.

Although the specifications (paragraph 3, No. 696, R. 36; No. 697, R. 37; *infra*, pp. 45–46) provided

that "excavations for footings shall be carried down to the depths and levels shown on drawings," they also provided (paragraph 4, No. 696, R. 37; No. 697, R. 38; *infra*, pp. 46–47) that "for estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level" and that "for any additions or deductions" "the unit prices quoted in bid will govern." Paragraph 45 of the specifications (No. 696, R. 37; No. 697, R. 38; *infra*, p. 47) provided for additional payment to respondent for the "extension of foundations beyond dimensions given on the drawings" and for deduction from the contract price "if solid foundation is found at a lesser depth than the dimension given on the drawings." The court below found that "the depth of footings was shown on the drawings as 33 feet from the finished floor of the building" (No. 696, R. 37; No. 697, R. 38).

The Government paid respondent for the footing excavations on the basis of the provision in the specifications that the depths of foundations be estimated on the basis of 37 feet 6 inches below first floor level. It thus resolved the discrepancy between the provisions of the specifications and drawings in the only way it could be resolved under the terms of the contract, since Article 2 of the contract (No. 696, R. 14; No. 697, R. 14, *infra*, p. 43) and paragraph G. C. 21 of the speci-

fications (*infra*, p. 45) provided that "in case of difference between drawings and specifications, the specifications shall govern." The court below found that respondent had estimated its bid on the 33-foot basis (No. 696, R. 37; No. 697, R. 35) but that respondent "had as full a notice of the 37-foot 6-inch provision as it had of the 33-foot and may not say it was misled" (No. 696, R. 47). Despite this, however, and despite the clear direction in the contract repeated in the specifications as to how the drawings and specifications, where they appear to differ, must be reconciled, the court below held them to be irreconcilable (No. 696, R. 47) and concluded that the excavations were to be paid for on the 33-foot basis (No. 696, R. 47–48; No. 697, R. 45).

The court said that "by using the 37-foot 6-inch pay basis there resulted no additions whatever to the contract price, only deductions, a one-sided proposition, somewhat to [respondent's] discomfiture" (No. 696, R. 48), and chose the 33-foot basis as "the more logical of the two, for the 33 feet were shown on the drawings and that turned out to be approximately the average, and such a pay basis would involve both deductions and additions to the contract price * * * when the work was done and the accounts cast up" (No. 696, R. 47–48).

The court's "logic," however, lacks support in the facts. On the basis of the court's findings

(No. 696, R. 37, 47; No. 697, R. 38), it is clear that actual footing depths were unforeseeable; and it was for this reason that the specifications provided for additions to and deductions from the contract price, depending upon variations in the actual depths of the footing excavations. The variations were considerable: In No. 696, the depths from the first floor ranged from 29 to 37.5 feet, with an average of 32.49 feet (R. 37); in No. 697, they ranged from 27.58 feet to 42.42 feet, with an average of 34.43 feet (R. 39). On the basis of the range of depths in No. 696, the court below held that, since 37 feet 6 inches turned out to be the maximum depth, thereby resulting in "no additions whatever to the contract price, only deductions, * * * it was superfluous to talk about additions to the contract price, if there were to be none" and "logic and reason tip[ped] the balance in favor of the 33-foot pay basis" (R. 48).

In short, the "logic and reason" of the court below amount to this: At the time the contracts were entered into, actual footing depths were unforeseeable; it was clear only that their depths would vary. At that time the parties did not know whether 33 feet would be the minimum, the maximum, or the average depth. Neither did they know that with respect to the 37 feet 6 inches referred to in the specifications. Nor did they know whether the adoption of either of these figures as the "pay basis" would result only in

additions to the contract price or only in deductions therefrom or in both additions and deductions. It was only, as the court below itself found, "when the work was done and the accounts cast up" (No. 696, R. 48) that it appeared that, in No. 696, 33 feet was approximately the average footing depth and 37 feet 6 inches the maximum. The court below has thus ascribed to the parties to the contract a prescience as to the outcome of the footing excavations and an intention to contract on the basis of that prescience. We submit that logic and reason do not lead to such a result.

The unreasonableness of the decision below in this respect is demonstrated by the court's adherence in No. 697 to the same basis of decision it adopted in No. 696 (No. 697, R. 45) despite its own recognition that the "logic and reason" of No. 696 applied to the facts in No. 697 do not necessarily result in the same conclusion (No. 697, R. 45), for in No. 697 the maximum footing depth was almost five feet greater than in No. 696 (No. 696, R. 37; No. 697, R. 39) so that the use of the 37-foot 6-inch "pay basis" in No. 697 resulted in additions to as well as deductions from the contract price.

We submit, therefore, that the court below erred in allowing respondent to recover on its claims with respect to footing excavations and that its judgments in this respect should be reversed.

II. The United States is not liable under its contract for the increased wages respondent paid to its bricklayers

The court below erred also in entering judgment for respondent for the difference, in terms of wages paid its bricklayers, between the $1.00-per-hour minimum wage for skilled labor provided in Article 18 (a) of the contracts (No. 696, R. 23, 33; No. 697, R. 23, 34–35; *infra*, p. 44) and the $1.25 per hour the respondent paid its bricklayers, after being told to do so by the constructing quartermaster (No. 696, R. 34; No. 697, R. 35). In this connection as with respect to its decision of the question as to the basis of pay for the footing excavations, *supra*, the basic error of the court below lay in its failure to follow or apply the plain terms of the contracts.

A. Since respondent did not comply with the procedure for the settlement of disputes to which it had agreed, it had no standing to sue for breach of contract based on such disputes

The wages required to be paid by respondent were determined by Article 18 of the contracts (No. 696, R. 23–24, 33–34; No. 697, R. 23–24, 34–35; *infra*, pp. 43–44). Under Article 18 (a) (No. 696, R. 23, 33; No. 697, R. 23, 34; *infra*, pp. 43–44), minimum wage rates for skilled labor were established at $1.00 per hour.[20] Article 18 (c) (No. 696, R. 23, 33; No. 697, R. 24, 34; *infra*, p. 44) provided, however, that "in the event that the

[20] See note, *supra*, p. 7.

prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply." Article 18 (e) (No. 696, R. 24, 33; No. 697, R. 24, 34–35; *infra*, p. 44) provided:

> The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly * * *.

On March 3, 1934, the Board of Labor Review of the Federal Emergency Administration of Public Works ruled that bricklayers employed on another project for Army construction, at San Antonio, Texas,[2] to which respondent was not a party, should be paid at the rate of $1.25 per hour retroactive to February 2, 1934 (No. 696, R. 34; No. 697, R. 35). This decision was transmitted to respondent by the constructing quartermaster on March 20, 1934 (No. 696, R. 34; No. 697, R. 35). On March 23, 1934, the constructing quartermaster advised respondent that all bricklayers employed on the project here involved "will be

[2] "Fort Sam Houston and San Antonio are in the same vicinity" (No. 696, R. 45).

paid at the rate of $1.25 per hour" (No. 696, R. 34; No. 697, R. 35). On March 29, 1934, respondent stated "that it would be governed accordingly but under protest, and [that it] expected reimbursement of the difference of 25 cents per hour" (No. 696, R. 34; No. 697, R. 35). On May 12, 1934, the constructing quartermaster "advised" respondent "that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity, should be paid $1.25 per hour, retroactive to February 2, 1934," and that respondent "would be within its 'rights to file appeal with the Board of Labor Review from the decision of the contracting officer'" (No. 696, R. 34; No. 697, R. 35). Respondent took no such appeal but paid its bricklayers $1.25 per hour (No. 696, R. 34–35; No. 697, R. 36).

As we have shown above in connection with the question of footing excavations, Article 15 of the contracts (No. 696, R. 21, 30; No. 697, R. 21–22, 31; *infra*, p. 43) provided for the decision of all disputes, except labor disputes, "concerning questions arising under this contract" "by the contracting officer or his duly authorized representative, subject to written appeal by the contractor * * * to the head of the department." Although respondent failed to exercise its right of appeal under Article 15, and despite this Court's repeated ruling that Article 15 pre-

sents "'the only avenue for relief,' *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61, available for the settlement of disputes concerning questions arising under this contract" (*United States* v. *Blair*, 321 U. S. 730, 735), the court below allowed respondent recovery for the increased wages paid by it pursuant to the unappealed ruling of the constructing quartermaster and contracting officer.

That there was a dispute with respect to the additional wage payments cannot be denied. As the court below found (No. 696, R. 34; No. 697, R. 35), respondent acceded to the constructing quartermaster's "advice" "under protest". This reservation, however, while it evidenced the disagreement which existed between respondent, on the one hand, and the constructing quartermaster and contracting officer, on the other, with respect to whether the additional wages should be paid, did not save respondent's rights; the contracts did not recognize "protests" as such, but only appeals to the head of the department.

As it had done in the *Blair* case, 321 U. S. at 736, and as with respect to respondent's "failure to pursue the procedure outlined in Article 15" in connection with the question concerning the footing excavations (*supra*, p. 20), the court below also sought to justify respondent's failure to appeal with respect to the increased wages it was required to pay, on the ground that "it was plainly of no special interest to [respondent] to make

such an appeal,[22] for the contract provided an automatic increase in contract price to cover such an increase in wages" (No. 696, R. 45). That justification, however, lacks merit. For the court's assumption that the wage increase automatically resulted in an increase in the contract price[23] was the very issue that was in dispute and that should have been decided under Article 15.[24]

The decision of the constructing quartermaster and contracting officer that the respondent in-

[22] The appeal referred to by the court below was to the Board of Labor Review (No. 696, R. 45) as the constructing quartermaster, when advising respondent that the contracting officer had decided that the bricklayers should be paid $1.25 per hour, had further advised respondent that it "would be within its 'rights to file appeal with the Board of Labor Review from the decision of the contracting officer'" (No. 696, R. 34; No. 697, R. 35). In this we submit the constructing quartermaster was wrong as the Board of Labor Review was charged with the decision only of "labor issues" (No. 696, R. 21, 24, 30, 34; No. 697, R. 21, 24, 31, 35; *infra*, pp. 43–45), clearly embracing only issues between employers and employees. There was no such controversy, however, between respondent and its employees. Cf. *Blair* v. *United States*, 99 C. Cls. 71, 136, 149–151, reversed in other respects, 321 U. S. 730. The only controversy was between respondent and the Government.

[23] This assumption, as we point out below, pp. 38–41, was founded upon a misinterpretation of the contracts.

[24] It is to be noted that respondent does not appear to have shared the court's belief that "the contract provided an automatic increase in contract price to cover" the increase in wages being paid by respondent (No. 696, R. 45), for, had respondent so believed, it is certainly doubtful whether respondent would have protested against paying the increased wages (No. 696, R. 34; No. 697, R. 35).

crease its bricklayers' wages to $1.25 per hour appears to have been based on the theory that the ruling of the Board of Labor Review with respect to the Army construction project at San Antonio in effect determined that the prevailing hourly wage for bricklayers "proscribed under collective agreements or understandings between organized labor and employers on April 30, 1933," was $1.25 per hour. In that event, under Article 18 (c) of the contracts respondent was required to increase its bricklayers' wages up to that amount regardless of whether or not it was told to do so by the constructing quartermaster or the contracting officer. If the prevailing hourly wage for bricklayers "prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933," was not $1.25, then neither the constructing quartermaster nor the contracting officer was authorized to order respondent to pay wages at that rate. It was only if respondent's minimum wage rates were changed "by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review," that a contract price adjustment would result. Article 18 (e), No. 696, R. 24, 33; No. 697, R. 24, 34–35; *infra*, p. 44.

Thus, the questions as to whether the increase in bricklayers' wages "advised" by the constructing quartermaster was an increase under

Article 18 (c) of the contract;[25] whether respondent would receive a contract price adjustment on account of the increase; whether the constructing quartermaster or contracting officer had authority to direct respondent to make such an increase; whether the prevailing hourly wage for bricklayers "prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933," was $1.25; and, in short, whether respondent was obliged to increase its bricklayers' wages were obviously questions arising under the contract as to which respondent and the Government's representatives were in dispute and it was obviously for the purpose of adjusting such disputes that the parties had established the appeals procedure embodied in Article 15. If the constructing quartermaster or contracting officer exceeded or otherwise abused their authority in directing the increased wage payments, the procedure of Article 15 "provided a complete and reasonable means of correcting the abuses." *United States* v. *Blair*, 321 U. S. 730, 735. As this Court stated in that case (*ibid.*):

> Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactory by their superiors. Furthermore, Article 15 provided the Govern-

[25] The very ambiguity as to the basis for the increase underscores the need for administrative appeal, such as that provided by Article 15, to clarify the issue.

ment with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages[26] and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims.

We submit that respondent, having failed to avail itself of the procedure for the settlement of disputes provided in Article 15 of the contracts, may not recover on its claims for the increased wages it paid its bricklayers.

B. SINCE THE INCREASED WAGES RESPONDENT PAID ITS BRICKLAYERS WERE NOT ESTABLISHED BY THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, RESPONDENT WAS NOT ENTITLED TO A CONTRACT PRICE ADJUSTMENT

As noted above, the only provision in respondent's contracts for an increase in contract price based upon increased wages paid by it, is to be found in Article 18 (e) (No. 696, R. 24, 33; No. 697, R. 24, 34–35; *infra*, p. 44). That article provides for such adjustment only if "the Federal Emergency Administration of Public Works on

[26] The accumulation of increased wage payments in the instant cases amounts to $4,120.63 (No. 696, R. 34, 45; No. 697, R. 36, 45).

recommendation of the Board of Labor Review" established minimum wage rates different from those established by the contracts. The court below, in awarding judgment to respondent in the amount of the increased wages it paid its bricklayers, appears to have done so on the theory that the ruling of the Board of Labor Review concerning bricklayers' wages on another Army construction project in the vicinity of Fort Sam Houston applied to respondent's bricklayers, as "the wages prevailing in the vicinity were the wages to apply to a contract within that vicinity" (No. 696, R. 45). It is submitted that the court below was clearly in error.

1. It is to be noted first that, assuming that the constructing quartermaster's "advice" (No. 696, R. 34; No. 697, R. 35) was a direction to respondent to increase the bricklayers' wages, the direction was that of the constructing quartermaster or of the contracting officer. Such a direction, however, is not within the compass of Article 18(e), which provides for contract price adjustments only if the "different minimum wage rates" are "established" by the Federal Emergency Administration of Public Works acting on the recommendation of the Board of Labor Review.

2. Nor, assuming that the constructing quartermaster's "advice" was the transmittal to respondent of the decision of the Board of Labor Review,

is respondent entitled to a contract price adjustment on account of the increased wages paid by it. The decision of the Board of Labor Review on which the constructing quartermaster relied was in a proceeding to which respondent was not a party (No. 696, R. 34; No. 697, R. 35). The decision was in a proceeding involving an Army construction project different from those here involved (No. 696, R. 34; No. 697, R. 35). The decision was that bricklayers employed on *that* project should be paid at the rate of $1.25 per hour (No. 696, R. 34; No. 697, R. 35). It is thus clear that, regardless of what the effect of the decision of the Board of Labor Review may have been, it did not establish minimum wage rates for the respondent different from those provided by respondent's contracts.[27]

[27] It may well be, as suggested *supra*, pp. 35–36, that the effect of the decision of the Board of Labor Review increasing bricklayers' wages on another Army project in the vicinity of Fort Sam Houston was to determine that prevailing hourly wages for bricklayers "prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933," were above the $1.00 specified in Article 18-(a) of respondent's contracts as the minimum hourly rate for skilled labor. In that event, however, the minimum wages required to be paid by respondent were increased not by the Board of Labor Review but by Article 18 (c) of respondent's contracts (No. 696, R. 23, 33; No. 697, R. 24, 34; *infra*, p. 44) and the contracts provide for no adjustment in contract price arising out of minimum wage changes resulting from the provisions of that article.

3. Moreover, even if it be considered that the decision of the Board of Labor Review with respect to the bricklayers' wages on the other Army project in San Antonio effected a change in respondent's bricklayers' wages, respondent may not recover the amount of the increased wages paid by it since Article 18 (e) provides for such a contract price adjustment only if "the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review" "establishes" different minimum wage rates from those established by the contract. (Article 18 (e), No. 696, R. 24, 33, 44; No. 697, R. 24, 34–35; *infra*, p. 44. There is no suggestion by the court below, nor could there be, that the respondent's bricklayers' wage rates were changed by the Federal Emergency Administration of Public Works or that the $1.25 rate paid by respondent was established by the Federal Emergency Administration of Public Works.[28]

We submit, therefore, that respondent may not recover the amount of the increase in wages it paid its bricklayers.

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[28] Indeed, there is not even the suggestion below that the $1.25 wage rate which the Board of Labor Review ruled was applicable to the bricklayers employed on the other Army construction project in San Antonio was established with respect to that project by the Federal Emergency Administration of Public Works.

CONCLUSION

For the reasons stated, we respectfully submit that the judgments below are erroneous and should be reversed.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
ABRAHAM J. HARRIS,
PAUL A. SWEENEY,
Attorneys.

APRIL 1946.

APPENDIX A

CONTRACT PROVISIONS

ART. 2. *Specifications and drawings.*—* * * In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. * * *

* * * * *

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

* * * * *

ART. 18. *Wages.*—(a) All employees directly employed on this work shall be paid just and

reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.00
Unskilled labor	.40

[1] In No. 697, the minimum wage for skilled labor was originally $1.10, but was thereafter modified by the parties to $1.00 (R. 35).

* * * * *

(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

* * * * *

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental

changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

SPECIFICATIONS

G. C. 2. *Abbreviations.*—The following abbreviations are used in these specifications: U. S. for United States; Q. M. G. for Quartermaster General; C. Q. M. for Constructing Quartermaster.

* * * * *

G. C. 10. *Interpretation of Contract.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

* * * * *

G. C. 21. *Discrepancies.*—* * * In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the C. Q. M., without ~~whose decision said~~ discrepancy shall not be adjusted by the Contractor, save only at his own risk * * *. In case of difference between drawings and specifications, the specifications shall govern.

* * * * *

3. *Excavation.*—Do all excavating of every description and of whatever substances encountered to the dimensions and levels shown. All excavated material, including top soil, shall be de-

posited around the buildings, where and as directed by the C. Q. M. Top soil shall be stacked separately.

Excavations for footings shall be carried down to the depth and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.

Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.

Care shall be taken not to excavate beyond the depths shown on drawings, as no backfilling under footings will be permitted, and any excess below the levels shown shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact undisturbed bottoms.

All excavations shall be maintained in good order during the progress of the work, and, if necessary, sheet piling shall be used and maintained in position until removal is authorized by the C. Q. M.

4. Excavation for pier foundations will be made with a suitable boring machine acceptable to the C. Q. M. Such excavation will extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended. If wet or unstable materials are encountered in the process of boring holes, the excavation must be cased with metal casings of

ample strength to prevent crushing. Casings may be collapsible or of one length.

Ground water encountered must be kept from the excavation at all times. In no case will water be permitted to reach footing bottoms.

At the contractor's option, reaming of conical shaped bottoms may be performed either by hand or mechanical methods. For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

* * * * *

45. *Footings, etc.*—The Contractor shall see that the bottom of all excavations are undisturbed soil, properly leveled before pouring footings.

Extension of foundations beyond dimensions given on the drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of the bid. If solid foundation is found at a lesser depth than the dimensions given on the drawings, then a credit will be given the U. S., based on the "Unit Prices."

* * * * *

APPENDIX B

STATEMENT OF ADMINISTRATIVE PRACTICE

STATE OF VIRGINIA,

County of Arlington, ss:

Adel C. Harden being duly sworn deposes and says:

I am a Colonel in the Finance Department, United States Army, and am presently assigned as Chief, Receipts and Disbursements Division, Office of the Fiscal Director, Army Service Forces. I have had over twenty-five years experience in fiscal matters and I have years of experience handling disbursing accounts. I have effected payment on many construction contracts.

The practice is to have all contracts made with the Army paid by a disbursing officer after certification by a certifying officer, who may or may not be the same person as the disbursing officer. Usually upon cover pages of all construction contracts, the disbursing officer is designated as the Finance Officer of a particular district. Such a notation appeared on the cover of the contracts involved in the cases of *Joseph A. Holpuch v. The United States*, Court of Claims Nos. 43809 and 43812, as follows:

> To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, Texas.

This is merely an indication to the constructing quartermaster to which disbursing officer the constructing quartermaster should certify vouchers. The designation of the Finance Officer is not a term of the contract. It is part of an outline

showing the parties, the amount, the site of the work, the services to be performed, and the authorized accounts to which payments will be charged. The contract preamble and all of the contract terms follow the designation of the disbursing officer, which office might on Army orders be changed at any time. In making such a change the War Department would definitely not seek the consent of the contractor.

The contracts themselves provided:

> ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.
>
> ART. 16. *Payments to contractors.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration. * * *

Article G. C. 10 of the specifications provided:

> *Interpretation of contract.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. (meaning the defendant's constructing quartermaster), shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

On a construction contract containing the above terms the disbursing officer would not in practice alter or modify and would not be authorized to alter or modify the decision of a certifying construction quartermaster as to the basis on which payments can be made under the contract when such basis, as here, is dependent upon an interpretation of the specifications or has been covered by a decision on a dispute by the contracting officer. If the disbursing officer desired to question the propriety of making payment based on such an interpretation or decision he could submit the matter to the Comptroller General as a request for advance decision (31 U. S. C. 74) or he could transmit the matter to the General Accounting Office for settlement (31 U. S. C. 71).

I understand that payment for excavation of foundations was made in a monthly progress payment certified to by the constructing quartermaster; that in certifying the voucher for such payment the constructing quartermaster determined that the correct base for figuring additions

or deductions to the contract at unit prices was 37 feet 6 inches rather than 33 feet. Such a decision in our practice would not be made by a disbursing officer, because we would consider it to have been made under paragraph GC–10 of the specifications. Therefore, the Finance Officer would have no duty or authority to overrule it. Only if it were apparent that fraud was being practiced might the disbursing officer question any such payment. I also understand that the contractor protested the use of the 37 foot 6 inch base, whereupon the constructing quartermaster decided the dispute by overruling the contractor's protest and thereafter the contractor took no appeal either to the contracting officer or to the head of the Department. Our practice would be that where the constructing quartermaster as representative of the contracting officer decides such a dispute pursuant to Article 15 of the contract, the disbursing officer has no power to challenge such a ruling.

Another reason why the Finance Officer would not undertake to determine the question presented in this case is that finance officers as a rule have no experience with construction and would not be qualified to make such decisions.

(Signed) A. C. HARDEN,
Colonel, FD.

Sworn to before me this 27th day of June 1945.

J. LINDEN WILL,
Notary Public, Arlington County, Virginia.

My commission expires December 11, 1946.

U. S. GOVERNMENT PRINTING OFFICE 1946

SUPREME COURT OF THE UNITED STATES.

Nos. 696 and 697.—October Term, 1945.

696	The United States, Petitioner, *vs.* Joseph A. Holpuch Company.	On Writs of Certiorari to the Court of Claims.
697	The United States, Petitioner, *vs.* Joseph A. Holpuch Company.	

[May 20, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

The narrow question here is whether a contractor's failure to exhaust the administrative appeal provisions of a Government construction contract bars him from bringing suit in the Court of Claims to recover damages.

Respondent, a building contractor, entered into two contracts[1] with the United States through the War Department in 1933 to construct officers' quarters at Fort Sam Houston, Texas, which were being built as a Federal Emergency Administration of Public Works project. Disputes arose as to excavations for footings and as to increased wages ordered to be paid to respondent's bricklayers. Respondent brought suit against the Government on these matters in the Court of Claims, which entered judgments in favor of respondent on both items.[2]

Article 15, which appeared in both contracts, provided: "All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written

[1] The contracts here involved were both executed on U. S. Government Form No. P. W. A. 51.

[2] The Court of Claims entered separate judgments and opinions in relation to each of the two contracts, although both of them were identical and involved the same issues. The only difference between the contracts concerned the particular buildings to be constructed.

appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed."

The dispute concerning the footing excavations arose out of an apparent inconsistency between certain figures used in the specifications and in the drawings. The specifications estimated that respondent was to excavate to a depth of 37½ feet below the first floor level of the buildings. The drawings, on the other hand, were found by the Court of Claims to call for excavations to the depth of 33 feet. Additional payments were to be made to respondent for excavations deeper than indicated "on the drawings," while the Government was to receive a credit for excavations of a lesser depth. Respondent made various excavations ranging in depth from 27.58 feet to 42.42 feet. The problem thus presented itself as to whether the 37½-foot figure in the specifications or the 33-foot figure in the drawings should serve as the basis for extra compensation to the respondent and for credit to the Government.

Article 2 of the contracts provided: "In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer." The specifications contained a similar provision and added that the constructing quartermaster was to be the interpreter of the "intent and meaning of the drawings and specifications." The constructing quartermaster duly resolved the discrepancy in this instance by interpreting the specifications and drawings to mean that the footing excavations were to be paid for on the basis of the 37½ feet estimated in the specifications. Respondent made no attempt to appeal from this decision to the contracting officer or to the departmental head in accordance with the terms of Article 15.

The other dispute concerned a required increase in wages for respondent's bricklayers. The contracts established $1.00 per hour as the minimum wage rate for skilled labor unless, as of April 30, 1933, there should be a higher prevailing hourly rate prescribed by collective agreements between employers and

employees. Article 18(e) provided that this minimum wage rate "shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review," in which case "the contract price shall be adjusted accordingly." On March 3, 1934, the Board of Labor Review ruled that bricklayers on another Army construction project at San Antonio, Texas, with which respondent was unconnected, should be paid at the rate of $1.25 per hour retroactive to February 2, 1934. Respondent was informed of this decision and on March 23, 1934, the constructing quartermaster advised respondent that all bricklayers employed on the instant project "will be paid at the rate of $1.25 per hour." Respondent stated that it "would be governed accordingly but under protest, and [that it] expected reimbursement of the difference of 25 cents per hour." On May 12, 1934, the constructing quartermaster advised respondent "that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity [Fort Sam Houston is in this vicinity] should be paid $1.25 per hour, retroactive to February 2, 1934," and that respondent would be within its rights "to file appeal with the Board of Labor Review from the decision of the contracting officer."[3] No such appeal was taken; respondent merely paid its bricklayers $1.25 per hour and then filed a claim in the court below for the 25-cent differential. Here again the provisions of Article 15 were ignored.

We cannot sanction respondent's failure to abide by the appeal provisions of Article 15 of the contracts which it made with the United States. Both the dispute over the footing excavations and the dispute over the bricklayers' wages were "questions arising under this contract" within the meaning of Article 15. The first was a question arising under Article 2 of the contracts as well

[3] The constructing quartermaster was in error in stating that respondent could have appealed the wage increase decision to the Board of Labor Review. Under Article 15, the Board is charged with handling appeals only on matters involving "labor issues." This plainly means labor issues between employers and employees. See Blair v. United States, 99 Ct. Cls. 71, 149-150, reversed in other respects, 321 U. S. 730. Here, however, the only controversy lay between the respondent and the Government rather than between respondent and its bricklayers. Hence the ordinary review provisions of Article 15 were applicable, enabling respondent to appeal the contracting officer's decision to the departmental head or his representative. The Court of Claims made a like error in this respect.

as under the specifications, which expressly contemplated that Government officers would resolve all discrepancies between specifications and drawings. Their decisions in such matters were clearly appealable under Article 15. The second dispute was a question arising under the wage provisions of Article 18 of the contracts; that question involved a consideration of the factual situation surrounding the required wage increase and a determination of the validity and effect of the increase under the circumstances. Any decision or order of a subordinate Government officer in this respect was also appealable under Article 15. Yet respondent did not even seek the contracting officer's opinion as to the footing excavation decision of the constructing quartermaster. And as to the contracting officer's order requiring an increase in the bricklayers' wages, respondent neglected to file a written appeal to the departmental head or his representative.

But Article 15 is something more than a dead letter to be revived only at the convenience or discretion of the contractor. It is a clear, unambiguous provision applicable at all times and binding on all parties to the contract. No court is justified in disregarding its letter or spirit. Article 15 is controlling as to all disputes "concerning questions arising under this contract" unless otherwise specified in the contract. It creates a mechanism whereby adjustments may be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created. *United States* v. *Blair*, 321 U. S. 730, 735. This mechanism, moreover, is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract. *United States* v. *Blair, supra*, 735; *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61. And in the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court.

It follows that when a contractor chooses without due cause to ignore the provisions of Article 15 he destroys his right to sue for damages in the Court of Claims. That court is then obliged to outlaw his claims, whatever may be their equity. To do otherwise is to rewrite the contract.

In this instance no justifiable excuse is apparent for respondent's failure to exhaust the appeal provisions of Article 15. Certainly the reasons relied upon by the Court of Claims are

lacking in merit. The court felt that the dispute over the footing excavation figures involved only a matter of contract price computation and that the responsibility for such a computation rested solely with the Army Finance Officer at Fort Sam Houston, any decision by the contracting officer on the matter being no more than advisory. Since the contracts made no provision for an appeal of the Finance Officer's computation, the Court of Claims held that there was no appealable decision confronting respondent and that respondent's claim could be heard and determined by that court. Support for this novel interpretation was sought in the statement on the covers of the contracts that payment on the contracts was to be made "by the Finance Officer, U. S. Army, Fort Sam Houston, Texas."[4] The short answer is that this designation of a disbursing officer is not a part of the contracts and cannot be used in any way to alter or amend any actual provisions thereof. The designation only identifies the person whose duty it is to perform the ministerial function of disbursement and is subject to change at any time by the War Department without notice to the contractor.[4] Moreover, even if it be assumed that the issue did concern only the amount of payment under the contracts,[5] such an issue is a question arising under

[4] The Government points out that in 1933 and 1934 there were 18 Army Finance Officers located at various places in the United States and that all the notation on the cover could mean was that payment was to be made by the Finance Officer at Fort Sam Houston, Texas, and not by a Finance Officer located elsewhere.

Moreover, an affidavit by the Chief, Receipts and Disbursements Division, Office of the Fiscal Director, Army Service Forces, appearing as an appendix to the Government's brief, states in regard to the notation: "This is merely an indication to the constructing quartermaster to which disbursing officer the constructing quartermaster should certify vouchers. The designation of the Finance Officer is not a term of the contract. It is part of an outline showing the parties, the amount, the site of the work, the services to be performed, and the authorized accounts to which payments will be charged. . . . On a construction contract containing the above terms the disbursing officer would not in practice alter or modify and would not be authorized to alter or modify the decision of a certifying construction quartermaster as to the basis on which payments can be made under the contract when such basis, as here, is dependent upon an interpretation of the specifications or has been covered by a decision on a dispute by the contracting officer. . . . Another reason why the Finance Officer would not undertake to determine the question presented in this case is that finance officers as a rule have no experience with construction and would not be qualified to make such decisions."

[5] Such an assumption is faulty in that nearly every dispute between a contractor and the Government ultimately involves the amount of payment under the contract. Hence, under the view of the Court of Claims, all such disputes would be subject to the Finance Officer's review, thereby nullifying Article 15 as well as other portions of the contract contemplating final decision by the contracting officer or the departmental head on these matters.

the contracts and hence expressly subject to the provisions of Article 15.

The Court of Claims sought to justify respondent's refusal to appeal the contracting officer's decision to increase the bricklayers' wages by holding that this decision automatically increased the contract price under the terms of Article 18(e). It stated that the constructing quartermaster reasonably construed the ruling of the Board of Labor Review in regard to the San Antonio project as applicable to the vicinity of San Antonio as well, the wages prevailing in the vicinity being the wages to apply to a contract within that vicinity. Thus it was said that it was plainly of no special interest to respondent to appeal the contracting officer's decision. But the assumption that this decision automatically resulted in a contract price increase is not in accord with the facts or with the contract provisions. Under Article 18(e) no automatic price increase results unless the wage change is established by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review.[6] The Board alone cannot effect a change; it can only make a recommendation. Here, however, there was no evidence that the wage increase either as to respondent or as to the San Antonio project was established by the Federal Emergency Administration of Public Works, the only agency that had authority to do so. Accordingly the provision of Article 18(e) for an automatic price increase did not come into operation, as was recognized by respondent in its protest. Serious questions were thus raised as to the authority of the contracting officer to direct a wage increase under these circumstances and as to the validity and effect of the ruling of the Board of Labor Review. Respondent should have secured a determination of those questions by challenging the contracting officer's decision pursuant to the provisions of Article 15.

Respondent having failed to avail itself of the procedure created by Article 15 for the settlement of disputes arising under

[6] The Board of Labor Review, although a part of the Federal Emergency Administration of Public Works, is a distinct entity. And Article 15 of the contracts made a clear functional distinction between the two in regard to wage rate increases. We are not free to disregard that distinction and rewrite the procedure established by Article 18(e).

the contracts, it was precluded from bringing suit on such matters in the Court of Claims. And the Court of Claims erred in entertaining and deciding the claims involving those disputes.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice DOUGLAS, dissenting in part.

The Court requires this contractor to pay out of his own pocket the wage increase which he was directed to make. Whatever support that conclusion may have in a literal reading of the contract, it is so harsh and unfair as to be avoided if the contract does not compel the result. I do not think it does.

The contract set a minimum wage rate of $1 an hour for bricklayers. But it also provided that if the "prevailing" hourly rates under agreements between organized labor and employers on April 30, 1933, were above that minimum rate, the higher rate would become the minimum and be paid.[1] The Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review could change the contract rate of $1 an hour; it could also change the "prevailing" hourly rate. If it did either, it would establish a "different" minimum or other rate within the meaning of the contract.[2] And the contract price would be adjusted accordingly.

The Board of Labor Review, acting for the Federal Emergency Administration of Public Works,[3] ruled that bricklayers on another

[1] "In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract."

[2] "The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract."

[3] The suggestion that the wage increase at San Antonio was not authorized by the Federal Emergency Administration of Public Works is not warranted by the record. The Board of Labor Review is a part of the Federal Emer-

government project at San Antonio should be paid at the rate of $1.25 an hour. San Antonio, as held by the Court of Claims, is in the same vicinity as Fort Sam Houston where the previous projects were under way. And plainly the "prevailing" hourly rate refers to the rate which obtains in the vicinity.

So the respondent paid the several wages under a ruling which, as I read the contract, was binding on him. It seems therefore manifestly unfair to hold that he must pay the wage increase out of his own pocket.

A contractor confronted with an order of the quartermaster to raise the wages of his employees is in an extremely difficult position. If he disobeys the order, he risks a strike and industrial turmoil. Yet the Court holds that he must take that risk or else pay the wage increase from his own pocket. Such a literal reading of the contract is not a fair one. And it is not a necessary one, as I have shown. Hence I would choose a construction which avoided that harsh and unfair result and did not victimize the contractor. If he had not protested the order of the quartermaster but had acquiesced, I suppose no one would say that there had been a "dispute concerning questions arising under" the contract,[4] which should have been or could have been appealed. It is not doubted that then the contractor would be entitled to reimbursement. I see no difference in substance if the contractor, after an initial protest, acquiesces in the ruling and accepts the new "prevailing" rate and thus avoids dissension with his employees.

There is justice in what the Court of Claims ruled and I would sustain it.

Mr Justice FRANKFURTER and Mr. Justice RUTLEDGE join in this dissent.

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gency Administration of Public Works. It did not "recommend" an increase at San Antonio. It "formally ruled" that the bricklayers on that project "should be paid at the rate of $1.25 per hour." The Court of Claims treated that action by the Federal Emergency Administration of Public Works. That seems to me to be the fair construction; and it was so treated both by the quartermaster and the contractor.

[4] The government concedes that the quartermaster's advice to respondent that he could file an appeal with the Board of Labor Review was erroneous. It points out that the Board of Labor Review was charged with the decision only of "labor issues", which embrace controversies between employers and employees. The confusion existing in the mind of the government's own representative emphasizes the trap set for this contractor whether he followed the quartermaster's suggestion or acquiesced in his ruling.